

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 289

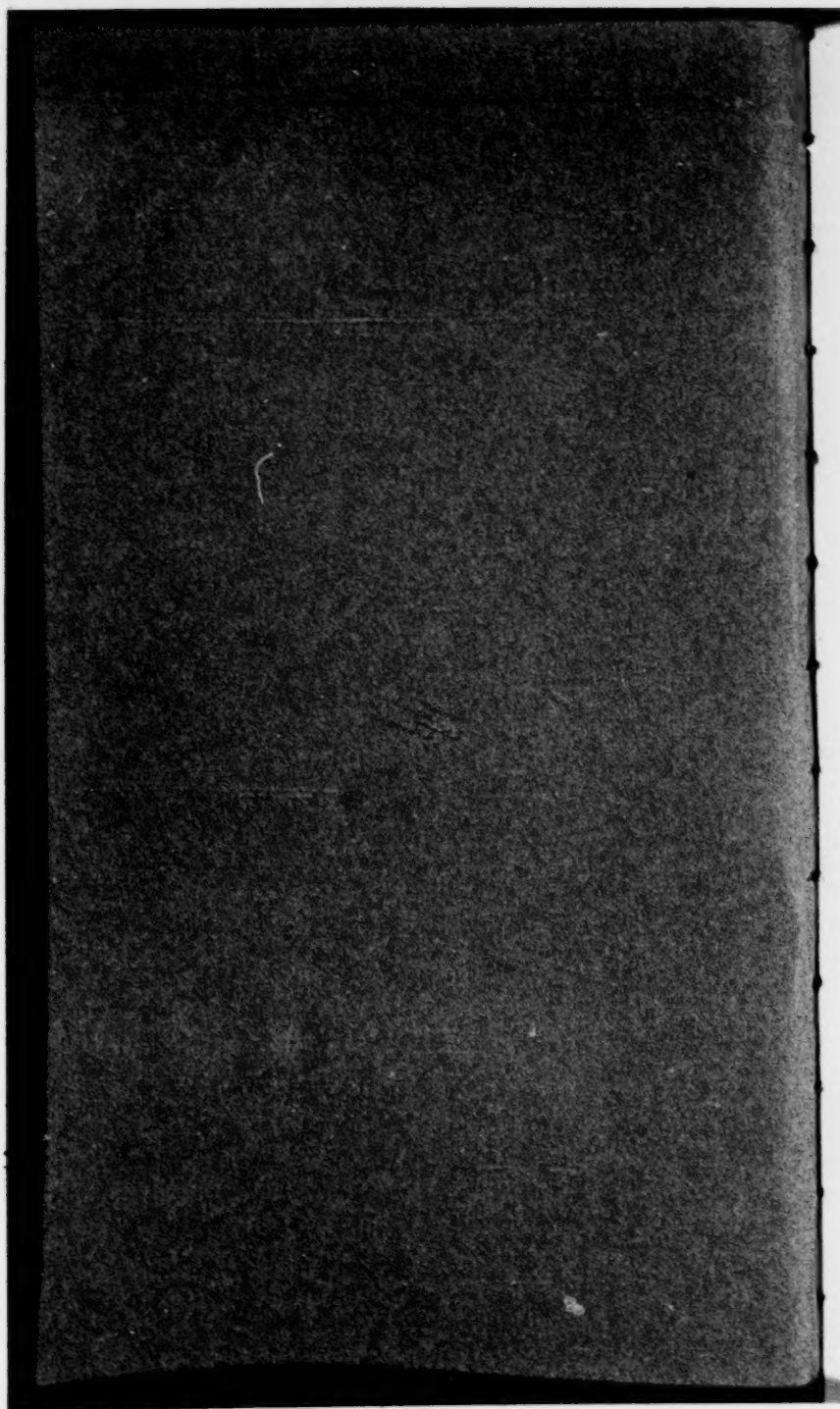
**R. W. BRATTON, ERNEST ADAMS, AND JOHN F.
BROWNLOW, JR., ET AL, APPELLANTS,**

**vs.
WILLIAM C. CHANDLER AND JAMES E. WALDEN, INDIVIDUALLY AND AS COPARTNERS UNDER THE FIRM NAME AND STYLE OF CHANDLER & WALDEN, ET AL**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TENNESSEE.**

FILED JANUARY 2, 1923

(35,000)



(28,630)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 675.

R. W. BRATTON, ERNEST ADAMS, AND JOHN F.
BROWNLOW, &c., ET AL., APPELLANTS,

vs.

WILLIAM C. CHANDLER AND JAMES E. WALDEN, INDI-
VIDUALLY AND AS COPARTNERS UNDER THE FIRM
NAME AND STYLE OF CHANDLER & WALDEN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TENNESSEE.

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1-2 United States District Court, Western District of Tenn. Filed
Nov. 1, 1921. J. Sam Johnson, Clerk.

In the District Court of the United States for the Western District
of Tennessee, Western Division.

No. 768. Equity.

WM. C. CHANDLER et al.

vs.

R. W. BRATTON et al.

Præcipe for Record.

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the Supreme Court of the United States, by including therein the following:

1. The bond for costs;
2. The original bill;
3. The original summons in equity;
4. The acknowledgment of service thereof by two of the defendants (appellants);
5. The marshal's return on the original summons;
6. The motion of complainants (appellees) for a temporary injunction, and for a restraining order;
7. Acknowledgment of notice of the motion for injunction, and for restraining order by Alfred A. Taylor, Governor of Tennessee, through his Secretary;
8. The restraining order;
9. The entry of defendants' (Appellants') appearance;
10. Defendants' (appellants') answer to original bill;
11. The order permitting an amendment to the original bill;
12. The amendment to the original bill;
13. Exhibit A to the amendment to the original bill;
14. Defendants' (appellants') answer to the amendment to the original bill;
15. The stipulation of attorneys for complainants and defendants as to certain facts;

16. The order of the court continuing the restraining order in force, and taking the cause under advisement;

17. The decree of the court on the hearing of the motion for a temporary injunction;

17a. Bond of Complainants for injunction;

18. The opinion of the court;

19. Defendants' (appellants') petition for appeal to the Supreme Court of the United States;

20. The defendants' (appellants') assignment of errors, on the appeal;

21. The order allowing the appeal and prescribing the bond for the appeal;

22. The bond for the appeal;

23. The citation on the appeal;

24. The complainants' (appellees') admission, by their attorneys, of service of the citation on appeal;

25. This *præcipe*;

26. The notice to the attorneys of the appellees (complainants) of the filing of this *præcipe*;

27. The acceptance of service of the notice and waiver by the attorneys of the appellees (complainants);

Dated this 1 day of November, 1921.

THOS. H. JACKSON,

M. M. NEIL, &

J. L. McREE,

Attys. for Appellants.

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Notice of Filing Præcipe.

In the District Court of the United States for the Western District of Tennessee, Western Division.

No. 768. Equity.

WM. C. CHANDLER et al.

v.

R. W. BRATTON et al.

To Messrs. Julius C. Wilson, Elias Gates, & Walter P. Armstrong,
Attorneys for Appellees:

Please take notice that on the 1st day of November, 1921, the undersigned filed with the Clerk of this Court a *præcipe* for the record to be transmitted to the Supreme Court of the United States on

the appeal taken in the above cause, a copy of which præcipe is herewith served on you.

Dated this 1st day of November, 1921.

THOS. H. JACKSON,
M. M. NEIL &
JAS. L. McREE,

Attys. for Appellants.

Service of the within notice and copy of præcipe is hereby accepted, and the same containing all that we desire to go into the record for appeal, we waive the right of appellees to file a præcipe on their own account, and agree that the clerk may proceed to prepare the transcript of the record for the appeal without further delay. This the 1st day of November, 1921.

J. C. WILSON,
W. P. ARMSTRONG,
ELIAS GATES,

Attys. for Appellees.

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Bond for Costs.

Filed July 5th, 1921.

Know all men by these presents, That we, William C. Chandler, George H. Glascock, A. C. Floyd, F. M. McMath, as principal- and Fidelity & Deposit Company of Maryland as Surety, are firmly held and bound unto Ernest Adams, R. W. Bratton, John F. Brownlow, and Sam. O. Bates, Attorney General of Shelby County, Tennessee in the sum of Two Hundred and Fifty Dollars (\$250.00), lawful money of the United States of America, but to be void on condition that the said William C. Chandler and others shall prosecute with effect, an action for an injunction against the enforcement of Chapter 98, Acts of the General Assembly of Tennessee for 1921, which they are about to commence in the District Court of the United States for the Western District of Tennessee, at Memphis, against the said Ernest Adams, R. W. Bratton, John F. Brownlow and Sam O. Bates, Attorney General and in the event the said principal- shall not pay all such costs and damages as may at any time be awarded against plaintiffs, or defendants, we, the said sureties, bind ourselves, our heirs, representatives and assigns, jointly and severally, by these presents to pay all such costs, and damages as may be awarded against defendants, or plaintiffs, or either of them.

Witness our hands and seals, this 5th day of July, A. D. 1921.

WILLIAM C. CHANDLER,
GEORGE H. GLASCOCK,
A. C. FLOYD,
F. M. McMATH,

All by WILSON, GATES & ARMSTRONG,

Attorneys.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND.

By M. F. DOBBINS,

Attorney in Fact.

Original Bill of Complaint.

Filed July 5, 1921.

To the Honorable Judges of the District Court of the United States for the Western District of Tennessee:

William C. Chandler and James E. Walden, individually and as co-partners under the firm name and style of "Chandler & Walden," Charles T. Wadlington and Leonard W. Wadlington, individually and as co-partners under the firm name and style of "Wadlington Brothers," N. I. Kabakoff and L. S. Powell, individually and as co-partners under the firm name and style of "Independent Realty Company," M. O. Allen, doing business under the firm name and style of "National Realty Company," C. A. Cleaves and J. B. Whitten, individually and as co-partners under the firm name and style of "Cleaves & Whitten," A. M. Johnston, C. M. Halford, F. M. McMath and S. E. Lemonds, individually and as co-partners under the firm name and style of "McMath & Lemonds, S. D. English, M. G. South, George H. Glasscock, C. A. Jones, O. S. Maiden, J. T. Thomas, doing business under the style of "Thomas Realty Company, R. Graham Bostwick, A. C. Floyd, P. M. Mobley, Ralph Graham, H. M. Hall, H. L. Higgs, J. N. Cathey, J. T. Gardner,

7 B. M. Kellern, J. L. Hall, C. S. Allen, H. B. Willis, B. F. Whitten, J. A. Haley, H. W. Miller, Sam Bowen, Jason Walker, all of whom are residents and citizens of the City of Memphis, in the County of Shelby, in the state of Tennessee, and inhabitants of the Western District of the State of Tennessee; McKinney Land & Investment Company, a body politic and corporate, and Washington Real Estate Company, a body politic and corporate, each being organized under the laws of the State of Tennessee and having its situs or principal place of business in Memphis, in said state of Tennessee, and being a citizen of the State of Tennessee. Complainants, bring this, their bill of complaint against Ernest Adams, a resident and citizen of the city of Memphis, in the County of Shelby, in the State of Tennessee, and an inhabitant of the Western District of the State of Tennessee; R. W. Bratton, a resident and citizen of the city of Nashville, in the County of Davidson, in the State of Tennessee, and an inhabitant of the Middle District of the State of Tennessee; and John F. Brownlow, a resident and citizen of the city of Knoxville, in the County of Knox, in the State of Tennessee, and an inhabitant of the Eastern District of the State of Tennessee, who are sued in their capacity as members of, and as constituting, The Tennessee Real Estate Commission; and Samuel O. Bates, a resident and citizen of the County of Shelby, in the State of Tennessee, and an inhabitant of the Western District of the said State of Tennessee, who is the Attorney General of the County of Shelby and who is the public officer charged with the prosecution and enforcement of criminal and penal statutes in Shelby County, Tennessee, as

respondents.
Your complainants now complain and say:

I.

That all of the complainants with the exception of J. N. Cathey, J. T. Gardner, B. M. Kellem, J. L. Hall, C. S. Allen, E. B. Willis, B. F. Whitten, J. A. Haley, J. W. Miller, Sam Bowen, and Jason Walker, have been and are now engaged in the business of real estate agent or real estate broker, as defined in the Public Acts of the General Assembly for the year 1919, Chapter 182 and Acts of 1921, Chapter 98, being House Bill No. 623, and that the remaining complainants, last above mentioned, are real estate salesmen as defined in each of the foregoing Acts of the General Assembly.

Your complainants further state and show that the different complainants have been engaged in said business of real estate agent, real estate broker, and real estate salesmen for sundry and divers times, some of them having been in business for thirty years or more; some for as much as ten years; others for five years; while others have more recently engaged in these vocations; that complainants have by long years of industry and close attention to their business succeeded in establishing profitable and lucrative business and have enjoyed the esteem and confidence of the public who have dealt with them generally.

II.

Your complainants further aver and state that each and every one of them has fully complied with the provisions and requirements of the Acts of 1919, Chapter 182; that sometime during the months of November and December, 1920, filed his or its application for a license, which application was accompanied by a recommendation on a form approved by the Attorney General, duly and properly signed, which recommendation certified that the signers thereof were acquainted with the applicant and believed said applicant to be honest, truthful, and of good moral character; and filed the same as required by said Act in Section 2 thereof; paid the said fee for license; and that a license was regularly and duly issued to them and each of them by the Clerk of the County Court; and that in each and every instance the said license stands unrevoked and is in full force and effect.

That the license issued *issued* as aforesaid authorizes the complainants, and each of them, to carry on the business of real estate agent or real estate broker or real estate salesman, as the case may be, subject only to the privilege tax of 1921, as provided by the General Acts of 1919, Chapter 182, Section 8; and which tax has been paid in full for the year 1921 by certain of the complainants, while others, in accordance with the privilege conferred upon them by the said Acts of 1919, Chapter 182, have paid the same in instalments for part of the year and are willing, ready and able, as and when the remaining instalments become due and payable, to pay the same promptly and in full.

III.

Your complainants further aver and state that at common law the business, such as that in which the complainants are engaged, has always been regarded as one of the lawful occupations and an ordinary avocation, in which citizens might engage freely without restraint or hindrance and which has been carried on for "time, whereof the memory of man runneth not to the contrary," and that the right to do such business belongs to citizens generally and is a common right; that the business is in-ocuous and harmless in itself and one which in no wise affects or touches the public health, safety, or morals, and only touches the public welfare in the way all business affects it.

IV.

Your complainants further aver and state that the General Assembly of the State of Tennessee for the year 1921 passed an act, being House Bill No. 623, Public Acts of 1921, Chapter 98, entitled:

"An act to define, regulate and license real estate brokers and real estate salesmen, to create a State Real Estate Commission, and to provide a penalty for a violation of the provisions hereof."

And your complainants now respectfully state and show that the aforesaid Act of the General Assembly, Chapter 98, deprives your complainants of their liberty of contract and of property without due process of law and that it is violative of the Fourteenth Amendment to the Constitution of the United States and of Article

10 I. Sec. 8 of the Constitution of the State of Tennessee, as is hereinafter more fully set forth, and denies your complainants the equal protection of the laws.

Your complainants further respectfully state and show that it is declared unlawful for any one to engage in the business of real estate broker or real estate salesman within the State of Tennessee without first obtaining a license under the provisions of the said act, the Act in that behalf being as follows:

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall be unlawful for any person, *person*, firm, partnership, association, or co-partnership, whether operating under an assumed name or otherwise, from and after July First, Nineteen Hundred Twenty-one, to engage in the business or capacity either directly or indirectly, of a real estate broker or real estate salesman within this state, without first obtaining a license under the provisions of this Act."

That under the laws of the State of Tennessee a corporation may be organized for the purpose of engaging in the business of a real estate broker or of real estate salesman, but the Act in no wise makes it unlawful for such corporation to engage in the business or capacity of either, as aforesaid, without first obtaining a license under the

provisions in said Act, notwithstanding that in Section 2 thereof it is enacted—

“That a real estate broker within the meaning of this Act, is any person, firm, partnership, association, co-partnership, or corporation, who for a compensation or valuable consideration engaging in the business, buys or offers to buy, or negotiate the purchase or sale or exchange of real estate, or who leases, or offers to lease, or rents or offers for rent any real estate or the improvements thereon for others as a whole or partial vocation.”

V.

Your complainants further aver and state that it is further provided in Section 1 of the Act that—

“License shall be granted only to persons who are trustworthy and bear a good reputation for honesty and fair dealing, and are competent to transact the business of a real estate broker or real estate salesman, in such manner as to safeguard the interests of the public and only after satisfactory proof has been presented to the commission.”

Your complainants further aver and state that the provisions of the Act, insofar as it provides that license shall be granted only to persons who are “trustworthy” and who are—

“Are competent to transact the business of a real estate broker or real estate salesman, in such manner as to safeguard the interests of the public.”

11 is vague, indefinite and uncertain; that the Act nowhere and in no wise defines what is “competent” within the meaning and purview of the statute, nor does it set up or afford any standard whereby the competency of the individual shall be ascertained or determined, but leaves it solely and wholly to the whim and caprice of the fluctuating membership of the said Commission.

Your complainants further state and show that while the said Act in Section 8 thereof provides that all applications for license shall be made in writing to the Commission and that the application shall be accompanied by certain recommendations and that the applicant shall furnish certain information to the Commission, yet nowhere is it made mandatory or imperative upon the Commission to issue a license if the applicant shall comply with the provisions of Section 8 of the Act.

Your complainants further state and show that the statute nowhere makes provision for any regular or fixed meetings of the said Commission and that there is in this statute nowhere a special provision for hearing or authority in the Commission to summon witnesses or compel them to testify in the event that the Commission should refuse a license to any applicant, and, therefore, your complainants aver and state that the statute is unconstitutional be-

cause it tends to deprive your complainants of their property without due process of law.

VI.

Your complainants further aver and state that the Act in Section 2 thereof defines with accuracy and precision the meaning of a "real estate broker" and a "real estate salesman", Section 2 thereof being as follows, to-wit:

"Be it further enacted that a real estate broker within the meaning of this Act, is any person, firm, partnership, association, co-partnership or corporation, who for a compensation or valuable consideration engaging in the business, buys or offers to buy, or negotiate the purchase or sale or exchange of real estate, or who leases or offers to lease, or rents or offers for rent any real estate or the improvements thereon for others as a whole or partial vocation. A real estate salesman, within the meaning of this Act, is any person who for a compensation or valuable consideration is employed either directly or indirectly by a licensed real estate broker to sell or offer to sell or buy or offer to buy, or negotiate the purchase or sale or exchange of real estate or lease or offer to lease, rent or offers to rent any real estate for others as a whole or partial vocation."

12 The said section of this Act further provides that the provisions of this Act shall not apply—

"To persons holding a duly executed power of Attorney from the owner for the sale, leasing or exchange of real estate."

Your complainants aver that the Act makes an arbitrary and unjust discrimination between those who engage in the business of real estate broker or real estate salesman, under an oral power of attorney, and those who act with regard to the sale, leasing or exchange of real estate, under "a duly executed power of attorney"; that as now written it is permissible for any one to represent a principal or any number of principals in the sale, leasing or exchange of real estate, without first applying for and obtaining a license under the provisions of this Act, or otherwise complying with the said Act, and that under the said power of attorney, he may be authorized to do such acts and only such acts as a regularly and duly licensed salesman or broker may do; and that the Act nowhere requires or provides that those holding "a duly executed power of attorney" shall have or exercise any power or powers other, or in addition to those exercised by a regularly and duly licensed broker or salesman; and, therefore, your complainants are advised and do now state and show that the said act is unconstitutional and violative of the provisions of the Constitutions of the United States and of the State of Tennessee, hereinbefore mentioned, and denies to your complainants the equal protection of the laws, thus violating Section 1 of the Fourteenth Amendment to the Constitution of the United States.

VII.

Your complainants further aver and state that said Act in Section 3 thereof provides:

"That one Act for a compensation or valuable consideration of buying or selling real estate of, or for another, * * * shall constitute the person * * * a real estate broker or a real estate salesman, within the meaning of this Act."

Your complainants are advised that this provision of said Act is unconstitutional; that one act does not, and the Legislature cannot, make the doing of any one act the equivalent of engaging in a business defined by said statute, which is in violation of the Constitutions of the United States and of Tennessee.

13

VIII.

Your complainants further state and show that the said Act provides that—

"A notice in writing shall be given to the Commission by each licensee of any change of principal business location" and that "a change of business location without notification to the Commission and without the issuance by it of a new license, shall automatically cancel the license theretofore issued."

The Act further provides:

"When any real estate salesman shall be discharged or shall terminate his employment with the real estate broker by whom he is employed, it shall be the duty of such real estate broker to immediately deliver or mail by registered mail, to the Commission, such real estate salesman's license,"

which said provisions are embodied in Sections 9 and 10 of said Act.

Your complainants are advised and now state and show that such provisions are arbitrary and unjust and deprive those engaged in the business, of their property without due process of law, because, without compliance with the provisions of such law and without any substantial reason therefor, the Act operates to revoke a license already issued and to which the party is entitled, if he shall merely change his business location without giving notice thereof to the Commission; that nowhere in said Act is the location or place of business of the said broker or salesman made an element or condition of the issuance or granting of such license.

IX.

Your complainants further aver and state that the said statute authorizes and empowers the Commission to suspend or revoke any license issued under the provisions of the statute,

"At any time where the licensee, in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of:

(a) Making any substantial misrepresentation, or

(b) Making any false promises of a character likely to influence, persuade or induce, or

(c) Pursuing a continued and flagrant course of misrepresentation, or the making of false promises through agents or salesmen, or advertising or otherwise, or * * *

(g) Paying a commission or valuable consideration to any person not licensed under the provisions of this Act.

(h) Has demonstrated unworthiness or incompetency to act as a real estate broker or salesman in such manner as to safeguard the interests of the public."

Your complainants state and show that the said Act in this regard is indefinite, in that Subsection (a), which deals with "making any substantial misrepresentation", in no wise specifically designates to what "misrepresentation" shall relate nor does the statute afford or prescribe any standard, whereby the substantiality or immateriality of the representation, which shall be sufficient to revoke or suspend the license, may be determined. So that thereby the license of any real estate broker or salesman, issued under the said statute, may be revoked for any act done or performed, without the doer thereof having any means of determining in advance whether or not the representation shall be deemed a "substantial misrepresentation."

Your complainants further state and show that Subsection (b) thereof, that is "making any false promises of a character likely to influence, persuade or induce," is a vague, indefinite and unintelligible provision; that there is nothing in the statute which indicates to what such promise must relate or what it must be likely to persuade, influence or induce; and that it seeks to demonstrate as an offense the making of a false promise of a character likely to do certain things, regardless of whether or not it shall have such effect.

The Subsection (c) thereof, with regard to a "continued and flagrant course of misrepresentation," whether it is material or immaterial, is indefinite, and likewise "the making of false promises through agents or salesmen, or advertising or otherwise", regardless of whether or not it relates to any transaction in the course of the business or whether they lead or induce any one to act thereon, are made grounds for the revocation or suspension of the license.

Your complainants further aver and state that in Subsection (g) thereof, "paying a commission or valuable consideration to any person not licensed under the provision of this Act," is made the ground for revocation or suspension of the license. In this regard the Act tends to deprive the complainants of their property without due process of law and the right to pursue their vocation in the ordinary course because it cannot in any wise affect the public health, safety or morals, or in any wise touch or affect the public,

15 even if the broker or salesman shall seek to procure business through the aid or effort of others and shall pay them for bringing business to him.

That in Subsection (h) of Section 14, it is provided that the license may be revoked or suspended, if the broker or salesman has demonstrated unworthiness or incompetency to act as a real estate broker or salesman in such manner as to safeguard the interests of the public; that such provision is vague, indefinite and uncertain and affords no measurement, standard or *guage*, whereby such incompetency, as is mentioned in the Act, may be determined; that the effect and consequence of Section 14 is to vest in the Commission an arbitrary and unrestrained power and that therein and thereby, the Legislature has delegated to the Commission the legislative power and authority vested in it by the Constitution of the State and that such delegation is violative of the Constitution of the United States and of the State of Tennessee, and deprives complainants of the right to do business and their property without due process of law.

X.

Your complainants further aver and state that the said statute in Section 18 thereof provides as follows:

"Be it further enacted, That the Commission shall at least semi-annually publish a list of the names and addresses of all licensees, licensed by it under the provisions of this Act, and of all persons whose license has been suspended or revoked within one year, together with such other information relative to the enforcement of the provisions of this Act as it may deem of interest to the public. One of such lists shall be mailed to the County Court Clerk as a public record. Such lists shall also be mailed by the Commission to any person in the State upon request."

And that complainants are informed and believe and upon such information and belief, aver and state that it is the avowed intent and purpose of the defendant commissioners on the first of July, 1921, or as soon thereafter as they can prepare the same, to prepare and publish a list of the names and addresses of all licensed brokers and salesmen, licensed by it under the provisions of this Act; that your complainants, who shall not have applied for such licenses, will not be included therein and in consequence, it will lead and induce the public to believe that those, whose names are not included in such lists, are without authority to pursue their vocation as real estate agents, brokers or salesmen, notwithstanding

16 that your complainants have complied with the provisions of the Acts of 1919, Chapter 182, and have obtained their licenses from the County Court Clerk to so act, and will deter the public generally from dealing with your said complainants, or any one or more of them, as they otherwise would, were such list not published; and that thereby your complainants, and each and every of them, will in consequence thereof suffer and sustain an irrep-

arable injury and damage which can not be measured or compensated for in money.

XI.

Your complainants further aver and state that the said Act, Section 20, enacts:

"Be it further enacted, That any person, firm, partnership, association, copartnership, or corporation, violating the provisions of this Act, shall upon conviction thereof, be fined by a fine of not less than \$25.00 nor more than \$100.00."

That the defendant, Samuel O. Bates, as the Attorney General of the County of Shelby, in the State of Tennessee, wherein your complainants reside, is by the law charged with the duty of instituting and prosecuting any and all violations of the statute and that the said Samuel O. Bates, as Attorney General aforesaid, will, as your complainants verily believe and apprehend, proceed, unless restrained, enjoined and prohibited by the order of this Honorable Court, to institute and prosecute your complainants, for the failure to comply with this statute and for the supposed violation thereof, notwithstanding that the said statute, as your complainants have hereinbefore shown, is unconstitutional and violative of the Constitutions of the United States and of the State of Tennessee, as hereinbefore shown.

That the value of the property rights to each of the plaintiffs in this cause and of the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00.

Wherefore the complainants pray, premises considered, (1) That a writ of subpoena may issue against and be served upon the defendants, Ernest S. Adams, and Samuel O. Bates, the Attorney General of Shelby County, Tennessee, and that a duplicate writ may be issued against and served upon the defendants, R. W. Bratton and John F. Brownlow, directed to the Marshal of the Eastern District

of Tennessee, in which the latter two defendants reside;
17 (2) that they be required to answer this bill of complaint, but not upon oath, the oath to their several answers being waived; that a temporary restraining order may be granted restraining the enforcement, operation or execution of the statute of the said acts of the General Assembly for the State of Tennessee for the year 1921, Chapter 98, and that a temporary or interlocutory injunction restraining the enforcement, operation and execution of the said statute be granted and that the defendants, and each and every of them, be restrained, prohibited and enjoined from proceeding thereunder, and that the injunction upon final hearing of this cause shall be made perpetual and that the said defendants, and each and every of them be forever restrained, enjoined or prohibited from acting or proceeding under the said statute or instituting any proceeding thereunder; (3) that the notice for application for such temporary injunction may be given to the Governor of the State of

Tennessee, Hon. A. A. Taylor, and to the Attorney General of the State of Tennessee, Hon. Frank M. Thompson; that the Court may be pleased to fix a day and time for the hearing of the application of said temporary injunction; (4) and your complainants pray for such other and further relief as the nature and circumstances of the cause may require.

And as in duty bound your complainants will ever pray.

This is the first application for writ of injunction in this cause.

JULIAN C. WILSON,
ELIAS GATES,
W. P. ARMSTRONG,
Solicitors for Complainants.

STATE OF TENNESSEE,
County of Shelby:

We, George H. Glascock, Chas. Wadlington, Sam E. Lemonds, W. C. Chandler, A. M. Johnston; make oath and say we are complainants in the within and foregoing bill of complaint; that we have read the same; that the matters stated, of our own knowledge, are true; and those stated on information and belief, we believe to be true.

GEORGE H. GLASSCOCK,
CHAS. T. WADLINGTON,
SAM E. LEMONDS,
W. C. CHANDLER,
A. M. JOHNSTON.

Sworn to and subscribed before me, this 30th day of June, 1921.

ERWIN O. HAID,
Notary Public.

18 District Court of the United States, Western District of Tennessee.

The President of the United States of America to the Marshal of the Western District of Tennessee, Greeting:

You are hereby commanded to summon R. W. Bratton, a resident and citizen of Nashville, Tennessee; John F. Brownlow, a resident and citizen of Knoxville, Tennessee; Ernest Adams, a resident and citizen of Memphis, Tennessee, who are sued in their capacities as members of and constituting the Tennessee Real Estate Commission and Samuel O. Bates, a resident and citizen of Shelby County, Tennessee, who is Attorney General of the County of Shelby, State of Tennessee, if to be found within your District, to appear before the District Court of the United States, in the Sixth Judicial Circuit for the Western District of Tennessee at Memphis, in said District on July 26th, next, then and there to plead, answer or demur to the bill filed in the office of the Clerk of said Court, on the 5th day of July, 1921, against said defendants by William C. Chandler and James E. Walden, individually and as co-partners under the firm name

and style of Chandler & Walden; Charles T. Wadlington and Leonard W. Wadlington, individually and as co-partners under the firm name and style of "Wadlington Brothers; N. I. Kabakoff and L. S. Powell, individually and as co-partners under the firm name and style of Independent Realty Company; M. O. Allen, doing business under the firm name and style of National Realty Company; C. A. Cleaves and J. B. Whitten, individually and as co-partners under the firm name and style of Cleaves & Whitten; A. M. Johnston; C. M. Halford; F. McMath and S. E. Lemonds, individually and as co-partners under the firm name and style of McMath & Lemonds; S. D. English; M. G. South; Geo. H. Glascock; C. A. Jones; O. S. Maiden; J. T. Thomas, doing business under the style of Thomas Realty Company; R. Graham Bostwick; A. C. Floyd; P. M. Mobley;

Ralph Graham; H. M. Hall; H. L. Higgs; J. N. Cathey; J. T. 19 Gardner; B. M. Kellem; J. M. Hall; C. S. Allen, H. B. Willis, B. F. Whitten; J. A. Haley; H. W. Miller; Sam Bowen; Jason Walker, all of whom are residents and citizens of the city of Memphis, in the County of Shelby, in the state of Tennessee, and inhabitants of the Western District of the State of Tennessee; McKinney Land and Investment Company, a body politic and corporate and Washington Real Estate Company, a body politic and corporate, each being organized under the laws of the State of Tennessee and having its situs or principal place of business in Memphis, in said state of Tennessee, and being a citizen of the State of Tennessee.

Herein fail not and have you then and there this writ.

Witness the Hon. J. W. Ross, Judge of the District Court of the United States, Western District of Tennessee, and the seal of said District Court at Memphis, Tennessee, this 6th day of July, A. D. 1921, and the 146th year of American Independence.

A. G. MATHEWS,

Clerk,

By E. J. HEIDEL,

C. D. C.

Memorandum.

The said defendants R. W. Bratton, et als. are required to enter their appearance in this suit in the office of the Clerk of the District Court at Memphis, Tennessee, on or before the day on which the subpoena is returnable, or the allegations of the bill herein will be taken for confessed against said defendant and judgment rendered accordingly.

A. G. MATHEWS,

Clerk,

By E. J. HEIDEL,

C. D. C.

Returned and filed July 21, 1921.

20 I hereby accept service of the herein foregoing summons within.

ERNEST ADAMS.
R. W. BRATTON.

Marshal's Return.

This writ came to hand on date issued and I executed the same as therein commanded on Samuel O. Bates, Attorney General of the County of Shelby, by reading to and leaving copy of this writ together with declaration in this case, this the 8th day of July 1921 at Memphis, Shelby County, Tennessee.

S. H. TREZEVANT,
U. S. Marshal,
By GEO. R. ELLIS, JR.,
Deputy.

Marshal's Return.

Executed as commanded by summoning John F. Brownlow this July 9, 1921, and leaving copy of bill.

INSLEE C. KING,
U. S. M.,
By S. LEWIS,
Deputy Marshal, Knoxville, Tenn.

21

Motion for Injunction.

Filed July 5, 1921.

Now comes the above named complainants and upon the verified bill of complaint, moves the Court for a temporary injunction, restraining enjoining and prohibiting the defendants, R. W. Bratton, Ernest F. Adams, and John F. Brownlow, individually, and as members of, and composing, the Tennessee Real Estate Commission, and Samuel O. Bates, the Attorney General of Shelby County, Tennessee, and each of them, during the pendency of the above entitled cause, from making publication of any lists of the names and addresses of licensees, who have complied with the Acts of the General Assembly of the State of Tennessee, for the year 1921, Chapter 98, and from instituting and prosecuting any proceeding against any one or more or all of said complainants for failure or refusal to comply with the aforesaid Act of the General Assembly of the State of Tennessee.

The complainants further move the Court for a temporary restraining order, without notice, restraining the above named defendants from doing any of the said acts until the application of the complainants for a temporary injunction can be heard, upon the ground that the said defendants have the right to publish such lists and can do so before the complainants can give notice before the application of the complainants for the restraining order and before the application for the injunction can be heard because the said Act takes effect on this day and immediate and irreparable loss and

damage will result to the complainants, before notice can be served and a hearing had thereon.

JULIAN C. WILSON,
ELIAS GATES,
WALTER P. ARMSTRONG,
Solicitors for Complainants.

22

Acknowledgment of Notice by Governor.

Filed July 9, 1921.

Tennessee.

Executive Chamber.

Nashville.

July 8, 1921.

Hon. A. G. Matthews,
Clerk District Court of U. S.,
Memphis, Tenn.

DEAR SIR:

Notice of motion for preliminary injunction in case of William C. Chandler and et al. plaintiffs, vs. R. W. Bratton et al. respondents received and have been called to Governor Taylor's attention.

Yours very truly,

A. L. GARRISON,
Secretary to the Governor.

A. L. G.: M. C.

23

The Restraining Order.

Entered July 5, 1921. J. W. Ross, Judge.

Whereas in the above cause a motion for the issuance of a preliminary writ of injunction has been duly filed and for a restraining order, without notice, and it having been made to appear that there is danger of irreparable loss and damage being caused to said complainants, before notice can be served and a hearing had thereon, unless the defendants are, pending such hearing restrained as herein set forth and the matter being urgent and not admitting of a notice for a motion of preliminary injunction, the Court does allow a restraining order enjoining, prohibiting and restraining the defendants, and each and every of them, from publishing a list or lists of the names and addresses of any persons licensed by it under the provisions of the Acts of the General Assembly of the State of Tennessee for the year 1921, Chapter 98 thereof, and from in any wise proceeding to the enforcement or execution of the said statute or from taking any proceedings thereunder against the said complainants, or any one or more or all of them, or from instituting any proceedings against the complainants, or any one or more or all

of them, for any supposed violation of such statute or from prosecuting any proceeding so begun thereunder.

It is further ordered that the hearing of this cause, upon the hearing of this injunction, shall be held at Memphis, Tennessee, on the 15th day of July, 1921, at ten O'Clock, A. M. in the United States District Court Room in that city.

It is ordered that the restraining order shall continue in force until the motion made for a temporary injunction can be heard and until the further order of the Court herein.

It is further ordered that the Clerk of this Court shall mail a copy of this order to the Attorney General of the State of Tennessee, Hon. Frank M. Thompson, and a copy of this order to the Governor of the State of Tennessee, Honorable Alfred A. Taylor, and to each of the defendants named herein.

25 *Entry of Defendants' (Appellants') Appearance.*

Filed July 22, 1921.

This day came Jackson, Neil & McRee and entered their appearance as Attorneys for the Defendants.

JACKSON, NEIL & McREE.
THOS. H. JACKSON.
M. M. NEIL.
JAS. L. McREE.

N. W. McCHESNEY,
Of Counsel.

26 *Defendants' (Appellants') Answer to Original Bill.*

Filed July 22, 1921.

The Joint and Separate Answers of Defendants, R. W. Bratton, Ernest Adams, John F. Brownlow, and Samuel O. Bates, to the Bill of Complaint.

1.

Defendant, Samuel O. Bates, says that he is the District Attorney General for the district composed of the County of Shelby, State of Tennessee, having been brought into Court as such, and sought to be enjoined by the bill from performing duties laid on him by law, the said bill being in effect a suit against the state, cannot be maintained as against him.

2.

Defendants, R. W. Bratton, Ernest Adams and John F. Brownlow, being brought before the Court as members of the Tennessee Real Estate Commission, created by Chapter 98 of the Acts of the General Assembly of the State of Tennessee for the year 1921, and being

sued as such, the suit against them is in effect a suit against the State of Tennessee, they being such officers, and the bill cannot therefore be lawfully maintained.

3.

The defendants say the bill should be dismissed in this case because it does not state any matter of equity entitling the plaintiffs to the relief prayed for; nor are the facts stated sufficient to entitle the plaintiffs to any relief against these defendants.

4.

For further defense to the bill, the defendants say:

They have no knowledge whether the complainants severally or any of them jointly, are engaged in business as real estate brokers, or real estate salesmen, nor if so engaged the length of time they have been engaged, nor whether any of the complainants are members of firms; nor whether any are corporations; nor whether
27 any of the complainants have a broker's license under the act of 1919, Chapter 182, referred to in the bill; nor whether they, or any of them, have complied with the provisions of said Act before obtaining such license, if any such license was obtained; nor whether they have paid the tax therein provided for under the terms or provisions of the Act; nor have they any knowledge as to which one of complainants *have* paid in full, or any part of the year 1921, if any portion of said tax has been paid for the said year 1921; and they call for proof of all such matters alleged in the bill in so far as the same may be material to the disposition of the controversy presented by the bill.

They deny that such licenses, if any, have not been revoked. On the contrary they aver that same have been revoked by Chapter 98 of the Public Acts of the General Assembly of Tennessee for the year 1921.

They do not know how long the business of real estate broker and the business of real estate salesman have been carried on; but they deny that said business applies to citizens generally of common right, free from any right of interference on the part of the State of Tennessee by way of regulation under its police powers.

They deny that "the business is innocent and harmless in itself, and one which in no wise affects or touches public health, safety or morals, and only touches the public welfare in the way all business affects it." On the contrary they aver that such business touches the public welfare at many points. It involves grave matters of trust and confidence between men. The real estate broker, in the essential nature of the business, and in accordance with the manner in which it is customarily pursued in actual operation, is the trusted agent of the party who employs him to negotiate a sale or lease of real estate for him, or to negotiate a purchase of real estate or a lease for his employer, or to collect rents for same, or make contracts for repairs and for improvements. Very large amounts of money, and great

28 values, are not infrequently involved in such agencies. In the essential nature of the business, and as the same is usually carried on, the client or employer engages the services of a real estate broker as an expert, and relies upon his advice. Many of such persons owning property, both men and women, desiring to sell or purchase real estate, make or procure leases, or make contracts in respect thereof, are persons of little or no experience in such matters, and rely implicitly upon the judgment and advice of the real estate broker, and it is essential that he be intelligent and conversant with the values of the kind of property in which he deals, or for the sale, purchase or lease of which he undertakes to act for his client; as well as that he shall be honest and faithful. It is within the power of such an agent to cause to his client the loss of large sums of money by ignorance and by incompetency, as well as by unfaithfulness and fraud. The nature of the business is such, that it is possible, by collusion of the agent-broker with the other side, that is with the persons from whom he is seeking to buy or lease, or to whom he is seeking to sell or lease, to cause great loss to his employer, and often with little probability of detection on the part of the employer. These facts are also true of the real estate salesman, modified only by the fact that he acts in conjunction with and under some real estate broker.

Defendants admit the passage of Chapter 98 of the Acts of the General Assembly of the State of Tennessee, and in order that its provisions may be conveniently before the Court, they herewith attach a certified copy of the Act as part of this answer, and make it Exhibit A thereto.

They deny that the excerpts from the Act set out in the bill accurately present the contents of the Act, since in complainants' bill many parts are omitted which throw light upon the parts which are copied into the bill, and the omitted parts greatly aid in the due construction of the parts which complainants have copied into their bill.

29 They deny that said Chapter 98 deprives complainants of their liberty of contract and of property without due process of law.

They deny that said Chapter 98 is violative of the 14th Amendment to the Constitution of the United States. They deny that said Chapter is violative of Article 1 of Section 8 of the Constitution of the State of Tennessee. They deny that said Chapter 98 denies to complainants the equal protection of the laws.

Further answering, defendants say:

They deny the allegation contained in Division IV of the bill that corporations are omitted from the operation and effect of said Chapter 98, but they aver that on the contrary, that under a true construction of said Act, Chapter 98, corporations are included therein. It is true that by an inadvertence of the draughtsman or a mistake on the part of the copyist in enrolling the bill, the first section does omit the word "corporations", but that is amply supplied by reference in the title to Section 2, the title stating, one of its

purposes being to "define real estate brokers and real estate salesmen, and Section 2 includes "corporations" within the definition; likewise Sections 3, 8, 11, 13, 17, and 20, expressly include "corporations;" evincing the unmistakable purpose to embrace corporations within the terms of the Act, and to make them subject to all of its terms and requirements.

Answering Division V of the bill defendants say:

They deny that "the provisions of the Act in so far as it provides that license shall be granted only to persons who are trust-worthy, and are competent to transact the business of real estate broker, real estate salesmen, etc. in such manner as to safeguard the interest of the public," is vague, indefinite and uncertain. It is true there is in the Act no formal definition of the word "competent", nor any attempt to formulate a standard of competency, further than it may be said of the word, it involves a reference to any standard dictionary of the English language, and to the experience of honest and intelligent men familiar with the nature of the business and its ordinary requirements. They deny that the matter is left to the "whim and caprice" of the membership of the Commission, and deny that honest and experienced men, such as Section 4 of the Act requires, would be controlled by "whim and caprice". They deny the allegations in Division V of the bill that "Nowhere does it make it mandatory or imperative upon the Commission to issue a license if the applicant shall comply with the provisions of Section 8 of the Act." Section 1 of the Act says, that brokers, etc., shall not do business "without first obtaining a license under the provisions of this Act". The next sentence in the same Section says, "licenses shall be granted," etc. Section 4 provides for the appointment of the Commission, and for its organization and the promulgation of necessary rules, regulations and the doing of all things necessary and convenient for carrying into effect the provisions of the Act. Section 5 provides for the employment of a secretary, clerks, and assistants, and for obtaining an office, office furniture, stationery, fuel, lights and such other proper conveniences as shall be reasonably necessary for carrying out the provisions of the Act. Section 6 provides for the adoption of a seal, the keeping of records of the Commission in the office open for public inspection. Section 9 imposes the duty of issuing licenses. The first sentence reads: "That the Commission shall issue to each license a license in such form and size as shall be prescribed by the Commission". Then follows the description of the license. Section 10 provides for the re-delivery of the license to the Commission and the issuance of a new license. Section 11 provides for the cost of the license. Section 14 provides for the suspension and revocation of licenses. Section 17 provides for the publication of the names of licensees. Section 18 provides for the publication of a semi-annual list of the names and addresses of all licensees licensed by the commission under the provisions of the Act, together with the names and addresses of all persons whose licenses have been suspended or revoked.

As to the matter of fixed meetings referred to in Division V of the

Bill, it is true said Act, Chapter 98, does not in so many words make provisions for "regular fixed meetings", but Section 4 provides for immediate organization of the Commission, and for the doing of "all things necessary and convenient for carrying into effect the provisions of the Act, and for the promulgation of necessary rules and regulations." Section 5 provides for the employment of a "secretary and of such clerks and assistants as shall be deemed necessary to discharge the duties imposed by the provisions of this Act;" and that "the commission shall obtain such office space, furniture, stationery, fuel, lights and other proper conveniences as shall be reasonably necessary for carrying out the provisions of this Act." Section 6 provides for the keeping of the records of the Commission "in the office of the Commission" the same to be open to public inspection, under the rules and regulations to be prescribed by the Commission. The Act thus provides for a fixed office, a place of business, and that it shall be kept ready at all times for business, properly equipped with Secretary and Assistants, etc. It is true that the Act in so many words does not provide before issuance of license for the summoning of witnesses, but it does provide, as already stated for the making of all rules necessary to carry out the business and (Section 8) the kind of evidence that the applicant must submit with his application. Section 8 then closes with the following sentence: "The Commission is hereby authorized and required to procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker's license, or salesman's license, or of any of the officers or members of any such applicant, prior to the issuing of any such license. The Commission is expressly vested with the authority to make, prescribe and enforce any and all such rules and regulations connected with the application of any licensee as shall be deemed necessary to administer and enforce the provisions of this Act."

Defendants deny that the statute, because of the matters just referred to, or for any other reason, is unconstitutional, or that it tends to deprive complainants of their property without due process of law.

32 Answering Division VI of the bill, defendants say:

They deny that the language in Section 2, declaring that the provisions of the Act shall not apply to a certain class of persons (namely: "to persons holding a duly executed power of attorney from the owner for the sale, leasing or exchange of real estate") makes an arbitrary and unjust discrimination "between those who engage in the business of real estate broker and real estate salesmen, under an oral power of attorney" (if there be any such thing in law), "and those who act with regard to the sale, leasing or exchange of real estate under a duly executed power of attorney." They deny that under cover of such duly executed power of attorney by the owner "for the sale, leasing or exchange of real estate," such person could perform the duties of a real estate broker or real estate salesman and exercise the privileges thereof, without first obtaining a

license. They deny that such persons could deal in lands other than that described in the written power of attorney given them by the owner of the real estate. They deny that such person could exercise any powers other than those specifically conferred in the written power of attorney, and aver that he would be subject to any restrictions that the owner of the real estate might choose to impose upon him different and distinct from those affecting real estate brokers and real estate salesmen described in the Act. They deny that such agent created by a duly executed power of attorney for the "sale, leasing or exchange" of the owner's property, would have the right to negotiate the purchase or lease of any property for any other person whatsoever. They deny that any person holding from the owner of real estate any such duly executed power of attorney for the sale, leasing or exchange of real estate, would be, or could be, a real estate broker or a real estate salesman, engaged in the business "as a whole or partial vocation," or that under the language he would be a real estate broker at all. They aver that the person holding a duly executed power of attorney from the owner of the land described in the Act, would stand in a distinct class from a real estate salesman, and that such classification is founded upon

33 sufficient grounds distinguishing same from the class denoted by the term real estate brokers and real estate salesmen. They deny that by reason of said provision the said Act is rendered Unconstitutional and violative of the Constitution of the United States and of the State of Tennessee in the respects already referred to herein, and deny that the said provision results in the denial to the plaintiffs of equal protection of the laws, and that it violates Section 1 of the 14th Amendment to the Constitution of the United States.

Defendants for answer to Division VII of the Bill deny that the provision therein quoted is unconstitutional, and that the Act thereby violates the Constitution of the United States and the State of Tennessee.

Replying to Division VIII of the Bill, defendants deny that the provisions quoted from the Act in said Division, are arbitrary and unjust, and deprive those engaged in business of their property without due process of law. They aver that Section 8 of the Act provides that every applicant for a license shall furnish a sworn statement setting forth his present address, both business and residence, and that every applicant for a broker's license shall also state the name of his present firm, partnership or corporation, and the location of the place, or places, for which said license is desired; that every real estate broker shall maintain a place of business in this state, that in case he maintains more than one place of business, duplicate licenses shall be issued to such broker for each branch office maintained, and that each duplicate license shall be issued without additional charge. That every real estate salesman shall set forth the names and the place of business of the present firm or corporation then employing him, or in whose employ he is to enter. Section 9 provides that license shall show the name and address of the licensee, and in case of a real estate salesman, the license shall show the name of the real estate broker by whom he is employed. That the license of each real estate salesman shall be delivered or mailed

to the real estate broker by whom such salesman is employed, and shall be kept in the custody or control of such broker. That
34 notice in writing shall be given to the Commission by each licensee of any change of principal business location, whereupon the Commission shall issue a new license for the unexpired period without additional charge. Then follows *is* Section 9 the provision "A change of business location, without notification to the Commission, and without the issuance by it of a new license, shall automatically cancel the license theretofore issued." Section 10 provides that when any real estate salesman is discharged, or shall terminate his employment with a real estate broker by whom he is employed, it shall be the duty of such real estate broker to *to* immediately deliver or mail by registered mail to the Commission, such real estate salesman's license. The real estate broker shall at the time of mailing such real estate salesman's license to the Commission, address a communication to the last known address of such real estate salesman, which communication shall advise such real estate salesman that his license has been delivered or mailed to the Commission.

Defendants aver that it is within the power of the real estate broker at any time to prevent the automatic cancellation of his license by notifying the Commission of his new location, and that it then becomes the duty of the Commission to issue a new license to him without charge. In like manner the real estate salesman, upon effecting a new connection, can obtain a new license. See Section 10, last two sentences. Defendants aver that there is a substantial reason for the last provision complained of. They aver that in no other way could track be kept of salesmen and the duties of the Commission performed under Sections 18 and 14.

For answer to Division of IX of the bill, defendants say: They deny that subdivisions (A), (B), (C), (G), and (H) of Section 14 of the Act are indefinite. It is true that the word "misrepresentation" is not defined, nor need it have been; nor is the word "substantial" defined; nor the expression "false promises". Nor need
35 any of these expressions any further definition other than is found in standard dictionaries. They deny that these expressions are vague, indefinite and unintelligible, and made regardless of any effect they might have. They deny that the provisions contained in Sub-section (c) of Section 14 are vague and indefinite. They deny that these matters are unrelated to any transaction in the course of the business. Section 14 confines the operation of its specifications (a), (b), (c), etc. to cases where "the licensee in performing or attempting to perform any of the acts mentioned herein is deemed to be guilty of" certain matters contained in the sub-sections.

Defendants deny that the matter contained in sub-section (g), (paying a commission or valuable consideration to any person not licensed under the provisions of this Act), tends to deprive the plaintiffs of their property without due process of law, and of the right to pursue their vocation in the ordinary course. They deny that it cannot in any wise affect the public health, safety, or morals, or

in any wise touch or affect the public even if a broker or salesman shall seek to procure business through the aid of effort of others, and shall pay them for bringing business to him. They aver that if such conduct as that described in sub-section (g) be permitted, it would be equivalent to allowing outside parties who have no license to carry on a business, and that the efficacy of the act would be greatly impaired, if not practically destroyed. They deny that sub-section (h) under Section 14 is vague, indefinite and uncertain and affords no measurement, standard or gauge whereby such incompetency as is mentioned in the Act may be determined. They aver that Section 4 of the Act makes it the duty of the Governor to appoint as members of the Commission three men of ten years' experience in the business, and that such men would know from experience what constituted incompetency, to say nothing of the meaning of the word as contained in the standard dictionaries of the English language. Defendants deny that the effect of Section 14 is to vest in the Commission an arbitrary and unrestrained power, and that thereunder and thereby the Legislature has delegated to the Commission the legislative power and authority vested in it by the Constitution of the State. They deny that said provisions

36 deny the plaintiffs the right to do business and of their property without due process of law, and that for this reason the same are unconstitutional, both under the state constitution and the federal constitution, or either.

Replying to Division X, defendants admit that it would be their duty under Section 18 of the Act to publish the lists therein mentioned. They aver that since the organization of the Commission they have received 827 applications for licenses, of these 354 being brokers and 473 being salesmen. They admit that the names of plaintiffs are not among this number, and upon publication of the lists they would be compelled to leave out the names of the plaintiffs.

Defendants therefore pray judgment of the Court whether they should further answer said bill, and that upon the hearing of said cause that the bill be dismissed, and defendants go hence with their costs in this behalf incurred.

F. M. THOMPSON,
Attorney General of Tennessee.
 THOS. H. JACKSON.
 M. M. NEIL.
 JAS. L. McREE.

N. W. MACCHESNEY,
Of Counsel.

37

Order Permitting Amendment.

Entered July 22d, 1921. J. W. Ross, Judge.

On motion of plaintiffs herein, it is ordered and decreed that they be permitted to make an amendment to their original bill herein by adding thereto the amendment this day filed as an amendment to

said original bill, adding certain averments therein just after paragraph "X" in said original bill as now filed and ending just before paragraph "XI" of the original bill as heretofore filed, the said amendment to be incorporated therein as if it were a part of said original bill.

38

Amendment to Original Bill.

Filed July 22, 1921.

Now come the plaintiffs in the original bill filed herein and by leave of Court first had and obtained, amend their original Bill by adding thereto at the end of paragraph "X" therein and just before paragraph "XI" therein the following:

The plaintiff attaches as Exhibit "A" to this bill a copy of said act of Legislature of Tennessee heretofore mentioned, and referred to, marked Exhibit "A" and aver in many other features and provisions as a whole the said Act violates the Fourteenth Amendment, Section One of the Constitution of the United States as well as the Constitution of the State of Tennessee in that it deprives them of their property and their right to earn their living in their vocation of life without due process of law and in that it discriminates against their rights as citizens of the United States and in particular said Act, and in addition to all the other provisions mentioned, deprives them of said rights and liberty and privilege to earn a living in the following particulars:

1. It provides that the Commission who shall pass upon their right to attend to their business shall be persons, "Whose vocations, for a period of at least ten years prior to the date of their appointment, shall be that of real estate broker or real estate salesmen," and further provides that the compensation shall not exceed the sum of Six Hundred Dollars (\$600.00) a year for each of said Commissioners thereby clearly contemplating that the Commissioners shall remain in the business of real estate broker or real estate salesman and subjecting these plaintiffs, and those situated like them in their right to remain in business to the judgment and determination of their competitors in business.

2. Said Act provides that the application for a license—

"Must be accompanied by the recommendation of at least two citizens, real estate owners, not related to the applicant, who have owned real estate for a period of one year or more in the County in which the applicant resides and has his place of business."

- 39 The said provision is unreasonable in requiring that the person transacting his business shall be able to procure the recommendation of two citizens, real estate owners, not related to the applicant who have owned real estate in the particular county for more than a year.

3. The said provision is unreasonable and oppressive and deprives real estate salesmen and these complainants of their right to work in their chosen vocation by providing that a salesman must have his application, "Accompanied by a written statement by the broker, whose employ he is to enter, stating that in his opinion the applicant is honest, truthful and of good reputation and recommending that the license be granted to the applicant," and in further providing in Section Nine that the license to a salesman is to be delivered to the broker by whom he is employed, kept in the custody and control of such broker, and in Section Ten of the Act that if a real estate salesman is discharged or shall terminate his employment with the broker by whom he is employed, it shall have the effect of cancelling his license and the real estate broker is required by said Act to deliver the license to the Commission, and in making it unlawful, "For any real estate salesman to perform any of the above acts contemplated by this Act, either directly or indirectly under the authority of said license from and after the date of receiving of the said license from said broker by the Commission," even though the salesman does not know of the return of said license and in providing in Section Eleven, "The revocation of a broker's license shall automatically suspend every real estate salesman's license granted to any person by virtue of his employment, by the broker, whose license has been revoked pending a change of employer and the issuance of a new license," and in Section Twelve thereof in making it unlawful, "For any real estate salesmen to accept consideration for the performance of any of the acts herein specified from any person except his employer who must be a licensed broker," and also in requiring each salesman to renew his license annually, as well as each time he voluntarily or involuntarily changes employers.

The effect of all of these provisions is to reduce real estate salesmen to a condition of servitude and make him but the peon
40 of a real estate broker, depriving him of his liberty, his right to labor and contract.

4. The said act also deprives the said plaintiffs of their liberty and property without due process of law in depriving them of their right to engage in their chosen vocation without paying an annual license fee and annually renewing their license and being each year subject to having a license refused them as provided in Section Eleven of said Act and in being subjected to said rejection each year without any notice or evidence heard in their presence, because the said Act provides in Section Eleven, "In the absence of any reason or condition which might warrant the refusal of the granting of a license, the Commission shall issue a new license for each ensuing year upon the receipt of a written request of the applicant and the annual fee therefor, as herein required," and also provides in Section Eight thereof, "The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness reputation and competency of any applicant for broker's license or salesman's license, or of any of the officers or members of any such applicant, prior to the issuance of any such license;" and neither of said Sections or any part thereof

makes provisions for any notice or hearing, or other fair determination upon notice to the applicant.

5. The said Act deprives plaintiffs and all other real estate brokers and agents of equal protection of the law in that it discriminates between individuals and partnerships on the one hand and corporations on the other hand by providing in Section One of the Act, which is the operative part thereof, that it is only unlawful for any person, firm, partnership, association or co-partnership to, "Engage in the business or capacity, either directly or indirectly, of a broker or or salesman within this State, without first obtaining a license under the provisions of this Act."

6. That the provisions of all of the Act taken as a whole are to deprive the plaintiffs and all real estate brokers and salesmen of the right to pursue their vocation without the consent to license of three other individuals and that it reduces to a state of servitude all of the plaintiffs and deprives them of their right to labor, liberty and property without due process of law.

That the plaintiffs have no plain, adequate or complete remedy at law.

Respectfully submitted,

JULIAN C. WILSON,
ELIAS GATES,
WALTER P. ARMSTRONG,
Solicitors for Plaintiffs.

42 EXHIBIT "A."

Filed July 22, 1921.

House Bill 623, Chapter 98, Public Acts of 1921.

Tennessee Real Estate Commission.

R. W. Bratton, President,

Commissioner Middle Division.

Ernest Adams,

Commissioner Western Division.

John F. Brownlow,

Commissioner Eastern Division.

43 House Bill No. 623, Chapter 98, Public Acts, 1921.

An Act to Define, Regulate and License Real Estate Brokers and Real Estate Salesmen, to Create a State Real Estate Commission, and to Provide a Penalty for a Violation of the Provisions Hereof.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall be unlawful for any person, firm, partner-

ship, association or copartnership, whether operating under an assumed name or otherwise, from and after July First, Nineteen Hundred Twenty-One, to engage in the business or capacity either directly or indirectly, of a real estate broker or real estate salesman within this State, without first obtaining a license under the provisions of this Act. License shall be granted only to persons who are trust-worthy and bear a good reputation for honesty and fair dealing, and are competent to transact the business of a real estate broker or real estate salesman, in such manner as to safeguard the interests of the public and only after satisfactory proof has been presented to the commission.

Sec. 2. Be it further enacted, That a real estate broker within the meaning of this Act, is any person, firm, partnership, association, copartnership or corporation, who for a compensation or valuable consideration engaging in the business, buys or offers to buy, or negotiate the purchase or sale or exchange of real estate, or who leases, or offers to lease, or rents or offers for rent any real estate or the improvements thereon for others as a whole or partial vocation. A real estate salesman, within the meaning of this Act, is any person who for a compensation or valuable consideration is employed either directly or indirectly by a licensed real estate broker to sell or offer to sell or buy or offer to buy, or negotiate the purchase or sale or exchange of real estate or lease or offer to lease, rent or offers to rent any real estate for others as a whole or partial vocation. The provisions of this Act shall not apply to any person, firm, partner-

Exceptions. ship, association, copartnership or corporation who as owner or lessor, shall perform any of the acts aforesaid, with reference to property owned by them, nor shall the provisions of this Act apply to persons holding a duly executed power of attorney from the owner for the sale, leasing or exchange of real estate, nor shall this Act be construed to include in any way the services rendered by an attorney at law in the performance of his duties as such attorney at law, nor shall it be held to include a receiver, trustee in bankruptcy, administrator or executor, or any person selling real estate under order of any court, nor to a trustee selling under a deed of trust.

Sec. 3. Be it further enacted, That one act for a compensation or valuable consideration of buying or selling real estate of, or for another, or offering for another to buy or sell or exchange Real Estate or leasing or renting or offering to rent Real Estate except as herein specifically excepted, shall constitute the person, firm, partnership, association, copartnership or corporation performing, offering or attempting to perform any of the Acts enumerated herein a Real Estate Broker or a Real Estate Salesman within the meaning of this Act.

44 **Sec. 4.** Be it further enacted, That, there is hereby created the Tennessee Real Estate Commission. Said Commission shall be appointed by the Governor of the State which will consist of three persons of which no more than two shall be composed of the same political party, one person from each Grand Division of the State of Tennessee, whose vocation for a period of at least ten years prior to the date of their appointment shall have been that of a real estate broker or real estate salesman, one member shall be appointed for a term of one year; one member shall be appointed for a term of two years; one member shall be appointed for a term of three years and until their successors are appointed and qualified; thereafter the term of the members of said commission, shall be for three years and until their successors are appointed and qualified. Members to fill vacancies shall be appointed for the unexpired term. The Commission, immediately upon the qualification of the member appointed in each year, shall organize by selecting a president, and may do all things necessary and convenient for carrying into effect the provisions of this Act and may, from time to time, promulgate necessary rules and regulations. Each member

of the Commission shall receive as full compensation for each day actually spent on the work of said Commission, the sum of \$10.00 per day, not to exceed six hundred (\$600.00) dollars in any one calendar year, and his actual and necessary expenses incurred in the performance of duties pertaining to his office.

Sec. 5. Be it further enacted, That the Clerks and assistants, Commission shall employ, and at its pleasure discharge a Secretary and such Clerks and assistants, as shall be deemed necessary to discharge the duties imposed by the provisions of this Act, and shall outline their duties and fix their compensation, subject to the general laws of the State of Tennessee. The Commission shall obtain such office space, furniture, stationery, fuel, light, and other proper conveniences as shall be reasonably necessary for carrying out the provisions of this Act.

Sec. 6. Be it further enacted, That the Commission shall adopt a seal with such design as the Commission may prescribe engraved thereon, by which, it shall authenticate its proceedings; copies of all records and papers in the office of the Commission, duly certified and authenticated by the seal of said Commission, shall be received in evidence in all courts equally, and with like effect, as the original, all records kept in the office of the Commission under authority of this Act shall be open to the public inspection under such rules and regulations, as shall be prescribed by the Commission.

Sec. 7. Be it further enacted, That all fees and charges collected by the Commission under the provisions of this Act shall be paid into the general fund in the State Treasury. All expenses incurred by the Commission under the provisions of this Act including compensation to members, secretaries, clerks and assistants, shall be paid out of the general fund in the State Treasury upon warrants of the comptroller from time to time, when vouchers therefor are exhibited and approved by the Commission. Provided, that the total expense for every purpose incurred shall not exceed the total fees and charges collected and paid into the State Treasury under the provisions of this Act.

Sec. 8. Be it further enacted, That, all applications for license shall be made in writing to the Commission. Such application, shall also be accompanied by the
 45 recommendation of at least two citizens, real estate owners, not related to the applicant, who have owned real estate for a period of one year or more, in the County in which said applicant resides, or has his place of business, which recommendation shall certify that the applicant bears a good reputation for honesty, competency, and fair dealing, and recommending that a license be granted to the applicant. Every applicant for a license shall furnish sworn statement setting forth his present address, both of business and residence, the complete address of all former places where he may have resided or been engaged in business, or acted as a real estate salesman, for a period of sixty days or more, during the last five years, and the length of such residence, together with the name of at least one real estate owner in each of the said counties where he may have resided, engaged in business, or acted as a salesman. Every applicant for a broker's license shall also state the name of the person, firm, partnership, copartnership or corporation, and the location of the place, or places, for which said license is desired, and set forth the period of time, if any, which said applicant has been engaged in the business, and shall be executed by such person, or by an officer or member thereof. Every real

Branch offices. estate broker shall maintain a place of business in this State. In case a real estate broker maintains more than one place of business within this State, a duplicate license shall be issued to such broker for each branch office as maintained. Each duplicate license shall be issued without additional charge. Every applicant for a

Salesman. salesman's license, shall, in addition to the requirements of the first paragraph of this section, also set forth the period of time, if any, during which he has been engaged in the business, stating the name of his last employer, and the name of the place of business of the person, firm, partnership, copartnership or corporation then employing him, or in whose employ he is to enter. The application shall be accompanied by a written statement by the broker in whose employ he is to enter,

stating that in his opinion, the applicant is honest, truthful and of good reputation, and recommending that the

Form of application. license be granted to the applicant. The Commission shall have the right to prescribe the form of application for all license. The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker's license or salesman's license, or of any of the officers or members of any such applicant, prior to the issuance of any such license. The

Rules and regulations.

Commission is expressly vested with the power and authority to make, prescribe and enforce any, and all, such rules and regulations connected with the application of any

license, as shall be deemed necessary to administer and enforce the provisions of this Act.

Form of license.

Sec. 9. Be it further enacted, That the Commission shall issue to each licensee a license, in such form and size as shall be

prescribed by the Commission. This license shall show the name and address of the licensee, and in case of a real estate salesman's license, shall show the name of the real estate broker by whom he is employed. Each license shall have imprinted thereon the seal of the Commission, and in addition to the foregoing, shall contain such matter as shall be prescribed by the Commission. The license of each real estate salesman shall be delivered or mailed to the real estate broker by whom such real estate salesman is employed, and shall be kept in the custody and control of such broker. It shall be the duty of each real estate broker to conspicuously display
46 his license in his place of business. Notice in writing shall be

Change of address. any change of principal business location, whereupon the Commission shall issue a new license for the unexpired period without charge. A change of business location, without notification to the Commission, and without the issuance by it, of a new license, shall automatically cancel the license theretofore issued. The Com-

Pocket card. mission shall prepare and deliver to each licensee a Pocket Card, not larger than two and one-fourth inches in width and three and three-fourths inches in length, which card, among other things, shall contain the name and address of the employer, and shall contain an imprint of the seal of the Commission, and shall certify that the person whose name appears thereon, is a licensed real estate salesman, or real estate broker, as the case may be, the matter to be printed on such pocket card, except as above set forth, shall be prescribed by the Commission.

Sec. 10. Be it further enacted, That when any real estate salesman shall be discharged or shall terminate his employment with the

Discharge of salesman.

real estate broker by whom he is employed, it shall be the duty of such real estate broker to immediately deliver, or mail by registered mail, to the Commission such real estate salesman's license. The real estate broker shall at the time of mailing such real estate salesman's license to the Commission, address a communication to the last known residence address of such real estate salesman, which communication shall advise such real estate salesman that his license has been delivered, or mailed to the Commission. A copy of such communication to the real estate salesman shall accompany the license when mailed or delivered to the Commission. It shall be unlawful for any real estate salesman to perform any of the above acts contemplated by this Act, either directly or indirectly, under authority of said license from, and after, the date of receipt of the said license from said broker by the Commission. Provided, that another license shall

Reissuance of salesman's license.

not be issued to such real estate salesman until he shall return his former pocket card to the Commission, or shall satisfactorily account to it for same. Provided further, that no more than one license shall be issued to any real estate salesman for the same period of time.

Sec. 11. Be it further enacted, That the first annual fee for each real estate broker's license, shall be Twenty (\$20.00) Dollars, and a renewal shall be Ten (\$10.00) Dollars.

Fees.

The first annual fee for such real estate salesman's license shall be Ten (\$10.00) Dollars and a renewal shall be Five (\$5.00) Dollars. Each real estate broker's license which may be granted to an individual, shall entitle such individual to perform all the acts contemplated by this Act

Free salesman's license.

without any further application on his part, and without payment of any fee other than the real estate broker's annual fee. Each real estate broker's license granted to any firm, partnership, association, co-partnership or corporation consisting of more than one person, shall entitle such real estate broker to designate one of its officers or members, who upon compliance with the terms of this Act shall without payment of any further fee, upon issuance of said broker's license be entitled to perform all of the acts of a real estate salesman contemplated by this Act. The person so designated however, must make application for a salesman's license which application shall accompany the application of the real estate broker, and be filed with the Commission, at the same time

47 as the application of the real estate broker for license. If, in any case, the person so designated, by the real estate broker shall be refused a license by the Commission, or in case such person ceases to be connected with such real estate broker, said broker shall have the right to designate another person who, shall make application as in the first instance. Every application for a license under

Expiration of
license.

absence of any reason

Renewal.

of the applicant, and

Revocation of brok-
ers' license suspends
salesman's license.

of employer and the issuance of a new license. Such new license shall be issued without charge, if granted during the same year in which original license was granted.

Sec. 12. Be it further enacted, That it shall be unlawful for any real estate salesman to accept a commission or valuable consideration for the performance of any of the Acts herein specified from any person except his employer who must be a licensed broker.

Salesman's
commission.

Sec. 13. Be it further enacted, That, before any person, firm, partnership, association, co-partnership, corporation or salesman shall be permitted to open, engage in, manage or conduct any real estate agency or office, or deal in real estate, or rent collections, as agent or broker or salesman, either in an office or otherwise such person, firm, partnership, association, co-partnership, corporation or salesman shall give a bond to the State of Tennessee, executed by two good and sufficient sureties to be approved by the Commission, or by a Surety Company duly authorized to do business in the State, in the sum of one thousand dollars, said bond to be in a form approved by the Commission, and for the use and benefit of all persons who may be injured or aggrieved by the wrongful acts or defaults of any person, firm, partnership, association or corporation, and any person so injured, or aggrieved, may bring suit on such bond in his, or her, name, and may recover thereon.

Bond.

Sec. 14. Be it further enacted, That the Commission may upon its own motion, and, shall upon the verified complaint in writing of any person, investigate the actions of any real estate broker, or real estate salesman, or any person who shall assume to act in either such capacity within the State, and shall have the power to suspend for a period less than the unexpired portion of the licensed period, or revoke any license issued under the provisions of this Act at any time where the licensee, in performing, or attempt-

Suspension and re-
vocation of license.

ing to perform, any of the acts mentioned herein, is deemed to be guilty of:

- (a) Making any substantial misrepresentation, or
- (b) Making any false promises of a character likely to influence, persuade or induce, or
- (c) Pursuing a continued and flagrant course of misrepresentation, or the making of false promises through agents or salesmen, or advertising or otherwise, or
- (d) Acting for more than one party in a transaction without the knowledge of all parties thereto, or
- 48 (e) Representing or attempting to represent a real estate broker other than the employer, without the express knowledge and consent of the employer, or
- (f) Failure to account for, or to remit for, any moneys coming into his possession which belongs to others, or
- (g) Paying a commission or valuable consideration to any person not licensed under the provision of this Act.
- (h) Has demonstrated unworthiness or incompetency to act as a real estate broker or salesman in such manner as to safeguard the interests of the public.
- (i) Any other conduct whether of the same or a different character than hereinbefore specified, which constitutes dishonest dealing.

This Act shall not be construed to relieve any person from civil liability, or criminal prosecution, under the general laws of the State.

Notification to licensee.

Sec. 15. Be it further enacted, That the Commission shall, before suspending or revoking any license and at least ten days prior to the date set for the hearing, notify in writing, the holder of such license of any charge made, and shall afford said licensee, an opportunity to be heard in person or by counsel in reference thereto. Such written notice may, be served by delivery of same, personally, to the licensee or by mailing same, by registered mail, to the last known business address of such licensee. If said licensee be a sale-man, the Commission shall also notify the broker employing him, of the charges, by mailing notice by registered mail to the broker's last known address. The hearing on such charges shall be at such time and place as the Commission shall prescribe. The

Subpoena of witnesses.

Commission shall have the power to subpoena and bring before it any person in this State or take testimony of any such person by deposition, with the same fees and mileage in the same manner as prescribed by law in judicial procedure

in courts of this State in civil cases. If the Commission shall determine that any licensee is guilty of a violation of any of the provisions of this Act, said licensee shall be suspended or revoked. The findings of this fact made by the Commission, acting within its power, shall in the absence of fraud be conclusive, but the Supreme Court shall have the power to review questions of law involved in the final decision or determination of the Commission; provided that application is made by the aggrieved party within thirty days after such determination, by certiorari, mandamus or by any other method permissible under the rules and practices of said Court of the laws of this State, and to make such further orders in respect thereto as justice may require.

Review of Supreme Court.

damus or by any other method permissible under the rules and practices of said Court of the laws of this State, and to make such

further orders in respect thereto as justice may require.

Revocation of Salesman's license.

Sec. 16. Be it further enacted, That any unlawful act or violation of any of the provisions of this Act upon the part of any real estate salesman, or employee, or any officer or member of a licensed real estate broker, shall not be cause for the revocation of a license of any real estate broker, partial or otherwise, unless it shall appear to the satisfaction of the Commission that the real estate broker had guilty knowledge thereof.

Non-resident licensee.

Sec. 17. Be it further enacted, That a non-resident of this State may become a real estate broker or a real estate salesman by conforming to all the conditions of this paragraph and this Act.

Every non-resident applicant shall file an irrevocable consent 48½ that suits and actions may be commenced against such applicant in the proper court of any county of this State in which a cause of action may arise in which the plaintiff may reside, by the service of any process or pleadings authorized by the laws of the State, on the Secretary of the Commission; said consent stipulating and agreeing that such service of such process, or pleadings on said secretary, shall be taken, and held, in all courts to be as valid and binding as if due service had been made upon said applicant in the State of Tennessee. Said instrument containing such consent shall be authenticated by the seal thereof, if a corporation, or by the acknowledged signature of a member or officer thereof; if otherwise all applications, except from individuals, shall be accompanied by the duly certified copy of the resolution of the proper officers or managing board authorizing the proper officer to execute same. In case any process or pleadings

Legal service on non-residents.

mentioned in this Act are served upon the Secretary of the Commission, it shall be by duplicate copies, one of which shall be filed

in the office of the Commission, and the other immediately forwarded by registered mail to the main office of the applicant against which said process or pleadings are directed.

List of licensees.

Sec. 18. Be it further enacted, That the Commission shall at least semi-annually

publish a list of the names and addresses of all licensees, licensed by it under the provisions of this Act, and of all persons whose license has been suspended or revoked within one year, together with such other information relative to the enforcement of the provisions of this Act as it may deem of interest to the public. One of such lists shall be mailed to the County Court Clerk in each county of the State, and shall be held by the County Clerk as a public record. Such lists shall also be mailed by the Commission to any person in the State upon request.

Fines.

Sec. 19. Be it further enacted, That, should the courts declare any section or provisions of this Act unconstitutional, such decision shall affect only the section or provisions so declared to be unconstitutional, and shall not affect any other section or part of this Act.

Sec. 20. Be it further enacted, That any person, firm, partnership, association, co-partnership or corporation violating the provisions of this Act shall upon conviction thereof, be fined by a fine of not less than \$25.00 nor more than \$100.00.

Sec. 21. Be it further enacted, That all laws or parts of laws in conflict with this Act, be and the same are hereby repealed, and that this Act take effect from and after its passage, the public welfare requiring it.

ANDREW L. TODD,

Speaker of the House of Representatives.

W. W. BOND,

Speaker of the Senate.

Approved 4-6-21.

A. A. TAYLOR,

Governor.

49

Answer to the Amendments to the Bill.

Filed July 26, 1921.

I.

For answer to amendment number one defendants say: the matters set forth therein state no matter of equity and the same are void in law.

II.

For answer to the second amendment, defendants say: They deny that the requirement therein mentioned is unreasonable.

III.

For answer to the third amendment, defendants say: They deny that the Act is unreasonable and oppressive and deprives real estate salesmen and the complainants of their right to work in their

chosen vocation by providing that a salesman must have his application accompanied by a written statement of the broker whose employ he is to enter, stating that, in his opinion, applicant is honest, truthful and of good reputation, and recommending that license be granted to the applicant.

They deny that provisions in Sections 9, 10 and 12 complained of in the third amendment are unreasonable and oppressive, and that they reduce the real estate salesman to a condition of servitude and make him but the peon of the real estate broker and deprive him of his liberty and of his right to labor and to contract. They show also that in Section nine provision is made for the issuance of a pocket card to a salesman. This card to show the name and address of the real estate salesman's employer and shall certify that the person whose name appears thereto is the licensed real estate salesman or real estate broker as the case may be; that in Section ten it is made the duty of the real estate broker to notify his salesman on returning a license to the Commission; also that it is the duty of the broker to send a copy of the notice to the Commission; also that a new license may issue to the salesman on returning his sales card (See Section 10, last two sentences).

50 It is not true that the real estate salesman is forbidden to perform any of the acts contemplated in the statute from and after the Commission receives the license from the broker, "even though the salesman does not know of the return of said license." By section ten — is made the duty of the real estate broker to immediately deliver or mail by registered letter to the Commission the real estate salesman's license when he ceases to be employed by his broker, but it is also the duty of the real estate broker at the time of mailing such real estate salesman's license to the Commission that he shall address the communication to the last known residence of the real estate salesman, which communication shall advise such real estate salesman that his license has been delivered or mailed to the Commission.

It is required by Section ten also that a copy of the communication thus required to be made by the real estate broker to the real estate salesman shall accompany the license when mailed or delivered to the Commission. It is only after these things have been accomplished that it shall be unlawful for a real estate salesman to perform any of the acts contemplated by the statute, but, as stated, on making a new connection, he can have a new license as set forth in the last two sentences of Section ten.

Section nine also provides "notice in writing shall be given to the Commission by each licensee of any change of principal business location, whereupon the commission shall issue a new license for the unexpired period without charge."

They deny that the provision is unreasonable and oppressive contained in Section twelve "that it shall be unlawful for any real estate salesman to accept a commission or valuable consideration for the performance of any of the acts specified in the statute from any person except his employer who must be a licensed broker." They

aver that this section only requires the real estate salesman to be faithful to his employer.

IV.

They deny that the requirement of an annual renewal of the license deprives the complainants of their liberty and property without due process of law.

Section eleven provides that in the absence of any reason or condition which might warrant the refusal of the granting of a license the Commission shall issue a new license for each ensuing year upon the receipt of a written request of the applicant and the annual fee therefor.

They deny that the provision is unreasonable and oppressive to the effect that renewal of license may be refused if there is any reason or condition which warrants such refusal. They deny that there is anything unreasonable or oppressive in the provision of Section eight to the effect that the Commission is authorized to require and procure any and all satisfactory proof which shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any application for broker's or salesman's license, or of any officers or members of any such applicant prior to the issuance of such license referred to in Section eight.

They deny that the complainants are deprived of any hearing as to either or any of the matters contained in sections eight or eleven.

V.

They deny that there is any discrimination in the Act between individuals and partnerships on the one hand and corporations on the other, but aver that the word "corporation" was unintentionally omitted in Section two, but they say that it appears in sections three, eight, thirteen, seventeen, and twenty.

VI.

They deny that the provisions of the Act taken as a whole in requiring a license deprives real estate brokers and salesmen of the right to lawfully pursue their vocation and that it reduces them to a state of servitude, and that it deprives them of their right to labor and to the possession of liberty and use of liberty and property without due process of law.

And now the defendants pray judgment of the court whether they shall further answer the said amendments, and that upon hearing the original answer, and this answer, complainants will be dismissed, and that defendants go hence with their costs in this behalf incurred.

F. M. THOMPSON,

Attorney General of the State of Tennessee.

JACKSON, NEIL & McREE,

M. M. NEIL,

JAS. L. McREE, *Sol. for Defts.*

N. W. McCHESNEY, *Of Counsel.*

53

Stipulation of Fact.

Filed July 28, 1921.

It is stipulated by and between counsel for plaintiffs and defendants on the hearing for an application for preliminary injunction that it is admitted as a fact that the plaintiffs hereinafter named as real estate brokers and salesmen and corporations engaged in the real estate business were so engaged in Shelby County, Tennessee, before the first day of July, 1921, being regularly licensed at that time pursuant to Chapter 182, of the Acts of the General Assembly of Tennessee for 1919. That is to say, persons and co-partnerships as brokers as follows:

Corporations and individuals as brokers as follows:

William C. Chandler and James E. Walden, individually and as co-partners under the firm name of "Chandler and Walden,"

Charles T. Wadlington and Leonard W. Wadlington, individually and as co-partners under the firm name and style of "Wadlington Brothers,"

N. I. Kabakoff and L. S. Power, individually and as co-partners under the firm name and style of "Independent Realty Company,"

M. O. Allen, doing business under the firm name and style of "National Realty Company,"

C. A. Cleaves and J. B. Whitten, individually and as co-partners under the firm name and style of "Cleaves and Whitten,"

A. M. Johnston,

C. M. Halford,

F. McMath and S. E. Lemonds, individually and as co-partners under the firm name and style of "McGrath and Lemonds,"

S. D. English,

M. G. South,

George H. Glascock,

C. A. Jones,

J. T. Thomas, doing business under the style of of "Thomas Realty Company,"

54 R. Graham Bostwick,

Ralph Graham,

A. C. Floyd,

P. M. Mobley,

Salesmen as follows:

H. B. Willis, with R. M. Johnston,

B. F. Whitten,

J. A. Haley,

With M. G. South.

H. W. Miller, with Thomas Realty Company,

Sam Bown, with C. C. Brown Land Company,

Jason Walker, with Ralph Graham.

Signed this the 22d day of July, 1921.

WILSON, GATES & ARMSTRONG,

Solicitors for Plaintiffs.

JACKSON, NEILL & McREE,

Solicitors for Defendants.

55 *Order Continuing Restraining Order and Taking Cause Under Advisement.*

Entered August 4, 1921.

This cause having been argued on motion, and interlocutory injunction, and being taken under advisement by Judges Donohue, Sanford and Ross: It is ordered that restraining order herein issued by District Judge, J. W. Ross be continued in full force until the disposition of the motion for an interlocutory injunction.

Enter this.

MAURICE H. DONOHUE,
Circuit Judge, Presiding.

O. K.
WILSON,
For Plaintiff.

O. K.
McREE,
For Dft.

56 *Order: Final Decree.*

Entered Oct. 20, 1921.

This cause came on to be heard on the 22d day of July, 1921, before the Honorable M. H. Donahue, Circuit Judge, presiding, and the Honorable J. W. Ross, and E. T. Sanford, District Judges, pursuant to notice duly given the defendants and to the Governor of the State of Tennessee and the Attorney General of said State, upon the motion of complainant for temporary injunction, the court having before it on consideration of said motion the bill of complaint of the complainants, the amendments thereto filed herein, the answer thereto of the defendants and the amendments to said answer thereto filed herein, and the stipulation of act filed herein, and thereupon on consideration of said motion the court is of the opinion that the Act of the General Assembly of the State of Tennessee for the year 1921, being Chapter 98, entitled "An Act to define regulate and license real estate brokers and real estate salesmen, to create a Real Estate Commission, and to provide a penalty for a violation of the provisions hereof," is violative of the Fourteenth Amendment to the Constitution of the United States, because Section 8 of the statutes authorizes the Commission not only to require the applicant to furnish further evidence, but also to procure independent of the applicant any and all satisfactory proof it may deem desirable in reference to the honesty, truthfulness, reputation and competency of any applicant, and because the statute makes no provision whatever for notice or opportunity to meet this evidence procured by the Commission, nor does it even require that the applicant shall be advised of the nature or the source of the evidence procured by the commission upon which it may refuse to issue a license, and be-

cause, further, said Section 8 gives color and purpose to every other section of the Act without which the other sections would be meaningless and therefore, that the Act is unconstitutional, null and void.

It is therefore, ordered, adjudged and decreed that a temporary injunction be and the same is hereby granted upon the plaintiffs executing bond in the penalty of one thousand dollars (\$1,-
 57 000.00), conditioned as prescribed by law, with good and solvent surety thereon to be approved by the Court, and that a temporary injunction issue as prayed for in the bill of complaint, restraining, prohibiting and enjoining as to the complainants and each and every of them the enforcement, operation or execution by the defendants, R. W. Bratton, Ernest S. Adams, and John F. Brownlow, comprising the Tennessee Real Estate Commission of the said Act of the General Assembly of the State of Tennessee for the year 1921, Chapter No. 98, and enjoining the said defendants and each and every of them from publishing a list of the names and addresses of persons as provided for in said Act and restraining, and prohibiting and enjoining the said Samuel O. Bates, the Attorney General of Shelby County, Tennessee, from the prosecution and enforcement of the penal provisions of the said Act of the General Assembly of the State of Tennessee for the year 1921, Chapter No. 98, as against the said complainants, or any one or more or all of them, to which action of the court in adjudging said act unconstitutional, null and void and in granting said temporary injunction in the premises the defendants except.

The opinion of the court filed in this cause is, by consent, made a part of the record in this cause.

58 *Bond for Injunction.*

Filed October 21, 1921. J. Sam Johnson, Clerk.

UNITED STATES OF AMERICA,
Western District of Tennessee;

Know all men by these presents That we, William C. Chandler and James E. Walden, individually and as co-partners under the firm name and style of "Chandler & Walden;" Charles T. Wadlington and Leonard W. Wadlington, individually and as co-partners under the firm name and style of "Wadlington Brothers"; N. I. Kabakoff and L. S. Powell, individually and as co-partners under the firm name and style of "Independent Realty Company;" M. O. Allen, doing business under the firm name and style of "National Realty Company"; C. A. Cleaves and J. B. Whitten, individually and as co-partners under the firm name and style of "Cleaves & Whitten;" A. M. Johnston; C. M. Halford; F. M. McMath and S. E. Lemonds, individually and as co-partners under the firm name and style of "McMath & Lemonds;" S. D. English; M. G. South; George H. Glascock; C. A. Jones; O. S. Maiden; J. T. Thomas, doing business under the style of "Thomas Realty Company;" R. Graham Bostwick; A. C. Floyd; P. M. Mobley; Ralph Graham; H. M. Hall; H.

L. Higgs; J. N. Cathey; J. T. Gardner; B. M. Kellem; J. L. Hall; O. S. Allen; H. B. Willis; B. F. Whitten; J. A. Haley; H. W. Miller; Sam Bowen; and Jason Walker; McKinney Land & Investment Company, a body politic and corporate; and Washington Real Estate Company, a body politic and corporate, (hereinafter styled as the "Principals") and the Fidelity & Deposit Company of Maryland, as Surety, are held and firmly bound unto R. W. Bratton, Ernest S. Adams and John F. Brownlow, who are sued in their capacities as members of and as constituting the Tennessee Real Estate Commission, and Samuel O. Bates, who is sued as Attorney General of the county of Shelby, Tennessee, (hereinafter styled the "Obligees") in the sum of One Thousand Dollars (\$1,000.00), to the payment of which they bind themselves, each for himself and his heirs, executors, administrators, and successors, firmly by these presents.

Scaled with their seals and dated this October 21st 1921. The condition of the above obligation is such that whereas the said William C. Chandler and the others hereinbefore named as "Principals," citizens of the State of Tennessee, have filed on the Equity Side of the District Court of the United States for the Western District of Tennessee, a bill against the said R. W. Bratton, Ernest S. Adams and John F. Brownlow, and the said Samuel O. Bates, Attorney General of Shelby County, Tennessee, the aforesaid "Obligees," and having obtained an allowance of an injunction as prayed for in said bill from said Court, now if the said William C. Chandler and others, the "Principals" herein named, shall abide the decision of said Court and pay all moneys and costs which may be adjudged against them, or any one or more of them, in case the said injunction is dissolved, then these presents shall be void; otherwise to remain in full force,

L. W. WADLINGTON,
N. I. KABAKOFF,
L. S. POWELL,
M. O. ALLEN,
L. M. HALFORD,
S. D. ENGLISH,
M. G. SOUTH,
O. S. MAIDEN,
J. T. THOMAS,
R. GRAHAM BOSTWICK,
A. C. FLOYD,
P. M. MOBLEY,
J. M. HALL,
J. N. CATHEY.

By WILSON, GATES & ARMSTRONG,
Their Solicitors & Attorneys.

WADLINGTON BROS.,
By CHAS. WADLINGTON,
WM. C. CHANDLER,
J. E. WALDEN,
C. A. CLEAVES,
J. B. WHITTEN.

GEO. W. GLASSCOCK,
 McMATH & LEMONDS,
 By SAM. E. LEMONDS,
 SAM. E. LEMONDS,
 F. M. McMATH,
 A. M. JOHNSTON,
 RALPH GRAHAM,
 JASON WALKER,
 H. L. HIGGS,
 C. A. JONES,
 FIDELITY AND DEPOSIT COMPANY [SEAL.]
 OF MARYLAND,
 By M. F. DOBBINS,
Attorney in Fact.
 J. T. GARDNER,
 B. M. KELLEM,
 J. L. HALL,
 O. S. ALLEN,
 H. B. WILLIS,
 R. F. WHITTEN,
 J. A. HALEY,
 H. W. MILLER,
 SAM. BOWEN,
 McKINNEY LAND & INVESTMENT CO.,
 WASHINGTON REAL ESTATE CO.,
 By WILSON, GATES & ARMSTRONG,
Their Solicitors & Attorneys.

60

61 *Opinion of the Court.*

Filed Sept. 28, 1921.

Before Donahue, Circuit Judge, and Sanford and Ross, District Judges.

Per Curiam:

The various individuals, co-partnerships and corporations joined as complainants in the original bill as amended, are real estate brokers or real estate salesmen as defined in the Public Acts of the General Assembly of Tennessee for the year 1919, Chapter 182 and Acts of 1921, chapter 98.

The defendants, R. W. Bratton, Ernest Adams and John F. Brownlow, are members of the Tennessee Real Estate Commission and are impleaded in their official capacity as members constituting that commission.

The defendant Samuel O. Bates is the Attorney General of the County of Shelby, Tennessee, and as such officer is charged with the prosecution and enforcement of criminal and penal statutes in Shelby County Tennessee.

The complainants ask a perpetual injunction restraining the de-

defendants above named from the enforcement, operation and execution of Chapter 98 of the Public Acts of the General Assembly for the State of Tennessee for the year, 1921, and that pending the final hearing, a temporary injunction be granted. It is the further prayer of the petition- that notice of the application for such temporary injunction may be given to the Governor and the Attorney General of the State of Tennessee.

This cause was submitted to this Court as now constituted upon the motion for a temporary injunction.

On the hearing, counsel for the Complainants conceded that the rights of complainants would be fully preserved and protected by a temporary injunction restraining the members of the Tennessee Real Estate Commission from publishing, under Section 18 of the Act in question, a list of the names and addresses of the real estate brokers and salesmen licensed by it and of all persons whose licenses had been suspended or rejected, and restraining the Attorney General

62 against these complainants pending the hearing of this case in this Court.

The jurisdiction of the Federal Court is invoked upon the theory that the Tennessee Act violates the Fourteenth Amendment to the Constitution of the United States. It is further averred in the original bill of complaint, as amended, that the value of the property rights to each of the complainants in this cause and of the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars.

This averment as to the value of the rights and matters in controversy is not denied by the defendants, therefore the question of jurisdiction as presented in *Nolan v. Reichman*, 225 Fed. 812, does not arise in this case, and for that reason no opinion is now expressed by this Court as to the necessity of alleging the amount in controversy as essential to the jurisdiction of the Federal Court to hear and determine the questions here presented.

The claim of the complainants that Chapter 98 of the Public Acts of 1921 violates the Fourteenth Amendment to the Constitution of the United States and the similar provision of the Tennessee Constitution is based upon the claims:

1st. That the Legislature of the State has no power to regulate the private business of real estate brokers and real estate salesmen, and that the attempt to do so is an arbitrary and unconstitutional interference with complainants to engage in a lawful business or calling.

2nd. That the Act is arbitrary and unreasonable.

3rd. That it is discriminatory.

4th. That the enforcement of its provision would amount to a taking of private property without due process of law.

In the disposition of this motion for a temporary injunction it is unnecessary to consider in detail all the objections urged by the complainants against the validity of this statute. The only question

for this Court, at this time, is whether there is sufficient doubt as to the constitutionality of this Act; that in the exercise of a provident discretion the enforcement of this statute as against these complainants, in the two particulars above named, should be temporarily enjoined. Naturally the major question is the right of the state, in the exercise of its police power, to regulate the business of real estate brokers and real estate salesmen.

This identical question was presented to the Supreme Court of California in *Riley v. Chambers*, 181 California 589, and answered by it in the affirmative.

The Supreme Court of the United States has, in several cases, emphatically declared that—

“A business by circumstance and its nature may arise from private to public concern and consequently become subject to governmental regulation regardless of whether the public has a right to demand such service.”

Ins. Co. v. Kansas, 233 U. S. 389; *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391; *German Alliance Ins. Co. v. Lewis*, 232 U. S. 389; *Adams v. Tanner*, 244 U. S. 590-596; *Murphy v. California*, 225 U. S. 623-628.

In *Lieberman v. Van de Carr*, 199 U. S. 552, it was held that—
“It is primarily for the State to select the business to be regulated.”

In *Ins. Co. v. Kansas*, *supra*, it is said that—

“What makes for the general welfare is matter of legislative judgment, and judicial review is limited to power and excludes policy.”

It was also held in the same case that—

“A general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause.”

Thirteen states have passed laws regulating the business of real estate brokers and real estate salesmen. While this does not amount to “A general conception of the law making bodies of the country”, nevertheless it is sufficient to show that, in the legislative judgment in this large number of states, there is sufficient cause for the regulation of this business and that such regulation will advantage the general welfare.

In the case of *Crowley v. Christensen*, 137 U. S. 86, the Supreme Court held that:

“The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country, essential to the safety, health, peace, good order and morals of a community.”

This declaration is quoted with approval in the case of *Gundling v. Chicago*, 177 U. S. 183-188, in which case it is also held that—

"What such regulations shall be and to what particular trade, business or occupation they shall apply are questions for the State to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner, wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

The opinion of the Supreme Court in the case of *Hall v. Geiger-Jones Co.*, 242 U. S. 539, is peculiarly applicable and in fact dispositive of many of the facts presented in this case. That was an action to enjoin the Superintendent of Banks and banking of the State of Ohio from enforcing the statute of that state commonly called the "Blue Sky" Law regulating the sale of stocks, bonds and other securities. In the extracts from the brief of counsel for the defendants in error, published in the report of that case at pages 545-6 and 547, it appears that the Constitutionality of that act was challenged upon substantially the same grounds upon which counsel for complainants attack the validity of this Act, yet the Supreme Court held that statute to be a constitutional exercise of the police power of the state to regulate the private business of stock brokers. It is insisted, however, that this case has no application to the case at bar, for the reason that—

"Stock securities are necessarily symbolic evidence of the ownership of material things and are not unlike warehouse receipts in representing something which is not present * * *. Opportunities and occasion of fraud in real estate are not sufficient to clothe the business with a public character or permit exclusion from the business."

Under the authorities above cited, that is a question for legislative judgment with which this Court can not interfere unless "the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the
65 citizens are unnecessarily and in a manner wholly arbitrary, interfered with or disregarded without due process of law."

It may also be said in passing, *Gundling v. Chicago*, *supra*, that while it is true as claimed by counsel for complainants that the sale of securities of various kind, constitutes a large part of the fundamental wealth of a nation and in view of public knowledge of the gigantic frauds that have been perpetrated upon the people of this country in the exploitation of worthless fruit lands in the Isle of Pines, swamp lands in Florida and imaginary timber lands in Arkansas, it would appear that frauds in real estate transactions

are not so "occasional", as claimed by counsel, as to furnish no cause or justification for state regulation.

However that may be, this Court is content with the answer given by the Supreme Court to the same contention made in *Hall v. Geiger-Jones Co.* supra, that—

"The prevention of deception is within the competency of government and that the appreciation of the consequences of it is not open for our review. The Trading Stamp Cases, 240 U. S. 342-391. Therefore, the purpose being legal, the question only remains whether the manner in which it is accomplished is illegal."

The claim that this statute is arbitrary and unreasonable is also fully answered by the Supreme Court in *Hall v. Geiger-Jones Co.* supra, *Gundling v. Chicago*, supra, *Hutchinson Ice Cream Co. v. State of Iowa*, 242 U. S. 153; *Lieberman v. Van de Car*, supra.; *Dent v. West Virginia*, 129 U. S. 114; *Red "C" Oil Mfg. Co. v. North Carolina*, 222 U. S. 380-394; *Film Corp. v. Commission* 236 U. S. 230; *Mutual Film Corp. v. Ohio Industrial Commission*, 236 U. S. 230.

In the case last above cited, in discussing the objection to the statute there under consideration, that it furnishes no standard of what is educational, moral, amusing or harmless, and hence leaves decision to arbitrary judgment, whim and caprice; or aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the "personal equation" to enter, resulting "in unjust discrimination against some propagandist film", while others might be approved without question, the Supreme Court said:

66 "But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore the law properly relies. This has many analogies and direct examples in cases, and we may cite *Gundling v. Chicago*, 177 U. S. 183; *Red "C" Oil Mfg. Co. v. North Carolina*, 222 U. S. 380; *Bridge Co. v. U. S.* 216 U. S. 177; *Butterfield v. Stranahan*, 192 U. S. 470. See also *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86. If this were not so the many administrative agencies created by the state and National Governments would be denuded of their utility and government in some of its most important exercises become impossible."

In reference to the same subject the Supreme Court said in *Hall v. Geiger-Jones Co.*:

"Inconvenience may be caused and supervision and surveillance, but this must yield to the public welfare; and against counsel's alarm of consequences, we set the judgment of the States."

In the case of *Dent v. West Virginia*, 129 U. S. 114-132, it was held that—

"The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

The statute under consideration by the Supreme Court in *Hall v. Geiger-Jones Co.* requires the applicant for license to file an application with the superintendent of banks or commissioner in such form as shall be determined by such commissioner, setting forth name and address of the applicant and all agents of such applicant assisting in the disposal of such securities. Location of applicant's principal office, plan and character of business, with references establishing good repute of such applicant in business, which the commissioner shall confirm by such investigation as he may deem necessary, and also an irrevocable consent that an action founded upon fraud in the disposal of such securities may be brought in Franklin County, Ohio.

67 The statute further provided that such license must be taken out at the beginning of each calendar year; that a license shall issue upon such application "If the Commissioners be satisfied of the good repute in business of such applicant and named agents;" that upon the written request of the applicant any license granted to any of his agents shall be revoked; that the Commissioner shall have the power to revoke any license or refuse to renew the same, upon ascertaining that the licensee—

- (a) Is of bad business repute;
- (b) Has violated any provision of this act; or
- (c) Has engaged, or is about to engage, under favor of such license in an illegitimate business or in a fraudulent transaction.

In referring to the objection that as to these requirements no standard is given to guide or determine the decision of the commissioner and that the discretion thus vested in the commissioner leaves "room for play and action of purely personal and arbitrary power," the Court said:

"The contention of appellees would take from the government one of its most essential instrumentalities, of which the various national and state commissions are instances."

The contention that the statute is discriminatory because the first section does not make it unlawful for corporations to engage in the business or capacity of a real estate broker or real estate salesman is merely technical and cannot be sustained.

It is apparent from the entire act that corporations are included within its provisions and if the terms used in the first section of the act are not sufficiently broad to include corporations, then the court in arriving at the intention and purpose of the legislature is authorized to supply that word in the first section. *Railroad v. Burn*, 119 Tenn. 278; *State v. Crocket*, 137 Tenn., 679-783.

That, however, would seem to be wholly unnecessary. The second section of the act defines a real estate broker as "Any person, firm, partnership, association, co-partnership or corporation who for a compensation or valuable consideration engages in the business, etc." Later in the same section it is declared that "The provisions of this act shall not apply to any person, firm, partnership, association, co-partnership or corporation who as owner or lessor, shall perform any of the acts, etc."

68 Section 11 provides that where a real estate broker's license is issued to a corporation that such license shall entitle the corporation to designate one of its officers or members, who upon compliance with the terms of this act shall act without the payment of any further fee.

Section 20 provides that any person, firm, partnership, association, co-partnership or corporation violating the provisions of this Act shall upon conviction thereof, be fined not less than \$25.00 nor more than \$100.00. It is therefore clear that corporations are included within the terms of this act and are subject to all of its terms, conditions and punishments.

The further claim that the act is discriminatory because it does not apply to persons holding a duly executed power of attorney from the owner for the sale, lease or exchange of real estate, is equally untenable. A power of attorney is something out of the ordinary in the average real estate transaction. A power of attorney transfers from the owner to the donee of the power full authority to deal with it as his own. Such power is, therefore, seldom or never granted by the owner except to persons in whose honesty and ability he has special confidence and trust. The person holding such power of attorney represents but one party to the transaction. He acts in the capacity of owner and has not, or at least should not have, any interest therein adverse to the owner.

While there is no evidence upon this subject yet it is perhaps common knowledge that a power of attorney is not executed and delivered in any substantial ratio to other real estate transactions. It is true perhaps that an attempt may be made to defeat the purpose of this law by resorting to a power of attorney, but in that event a power of attorney will come into such common use that the legislature will feel entirely justified in amending this act so that persons holding a power of attorney shall not be exempt from its provisions. However, that may be, it has not been made to appear to this court by any evidence, that a power of attorney is in such common use in Tennessee real estate transactions that the legislature was not entirely justified in making such exception.

The object and purpose of this act is to regulate the business of

real estate brokers and real estate salesmen and that particular business is not usually conducted through the medium of a power of attorney but rather by bringing the buyer and seller together
69 under such circumstances that each may act in his own behalf.

It is further insisted that the enforcement of the provision of this statute would amount to the taking of private property without due process of law for the reason that the act nowhere makes provision for notice to the applicant of the hearing upon his application, nor does it provide for hearing or an opportunity to be heard.

In reply to this objection it is urged that the laws of the State of Tennessee provide for a review by the Courts upon a writ of certiorari and that by reason of this provision the applicant may obtain relief through the court for any arbitrary exercise of this power. *Dent v. W. Va.*, 129 U. S. 114-124-125; *Plymouth Coal Co. v. Penna.*, 232 U. S. 531-545; *Bradley v. Richmond*, 227 U. S. 477-483; *Lieberman v. Van de Carr*, 199 U. S. 552-592; *Ky. Railroad Tax Cases*, 115 U. S. 321-335-336.

It is expressly held, however, in the case of *L. & N. R. R. v. Central Stock Yards Co.*, 212 U. S. 132-144, that—

“The law itself must save the parties’ rights, and not leave them to the discretion of the courts as such.”

Trust Co. v. Lexington, 203 U. S. 323-333; *Roller v. Holly*, 176 U. S. 398-409.

The giving of notice as a favor does not cure a statute that fails to provide for such notice. *Cole v. Armour Fertilizer Works*, 237 U. S. 413-424; *Security Trust Co. v. Lexington*, 203 U. S. 323-333; *Railroad Co. v. Wright*, 207 U. S. 127-138; *Roller v. Holly*, 176 U. S. 398-409; *Windsor v. McVeigh*, 93 U. S. 274-279; *Granis v. Ordean*, 234 U. S. 385-393.

A provision in the act itself that an adverse decision may be reviewed by the courts is equivalent to notice and hearings. *McMillen v. Anderson*, 95 U. S. 37; *Hall v. Geiger-Jones Co.*, 242 U. S. 553-554.

The statute under consideration by the Supreme Court in *Hall v. Geiger-Jones Co.* contains no provision whatever as to notice and hearing, but it expressly provides that any one whose license shall be refused or revoked, or to whom a renewal of license may be denied, may file, within thirty days thereafter, in the common pleas court of Franklin County, a petition against the commissioner alleging the plaintiff’s qualification to be licensed and praying for a reversal of the action complained of. This provision for a judicial review is emphasized by the Supreme Court in its opinion in that case.

70 In discussing the contention of counsel in error that the “Blue Sky” statute of Ohio conferred arbitrary power upon the commissioner, the court said:

“The discretion of the commissioner is qualified by his duty, and besides, as we have seen, the statutes gives judicial review of his

action. Pending such review we must accord to the commissioner a proper sense of duty and the presumption that the functions entrusted to him will be executed in the public interest, not want only or arbitrarily to deny a license or to take one away from a reputable dealer."

The authorities are practically unanimous in holding that a statute of this character that fails to provide for notice and hearing or for judicial review violates the due process provision of the Fourteenth Amendment to the Constitution of the United States. *Security Trust Co. v. Lexington*, 203 U. S. 323-333; *Paulsen v. Portland*, 149 U. S. 30-41; *Truax v. Raich*, 239 U. S. 33; *Railroad v. Minnesota*, 134 U. S. 418-457; *Central Ry. v. Weight*, 207 U. S. 127-138; *Railroad Co. v. Stock Yards Co.*, 212 U. S. 132-144; *Cole v. Fertilizer Works*, 237 U. S. 413-424; *Ohio Valley Co. v. Ben Avon Borough*, 253 U. S. 287.

Section 15 of this act provides for notice and hearing before revoking or suspending any license and it also provides for a judicial review of questions of law involved in the final decision or determination of the commission as to such revocation or suspension, but no provision is made in this statute for notice and hearing of the application for a license or for a judicial review of an order of the commission refusing such license.

If the commission were to pass solely upon the application and the accompanying evidence required by the statute and furnished by the applicant as to his good reputation for honesty, competency and fair dealing, the filing of such application and evidence would, perhaps, be a submission of the questions presented thereby for determination by the commission, but this Act authorizes the commission not only to require the applicant to furnish further evidence but also to procure, independent of the applicant, any and all satisfactory proof it may deem desirable in reference to the honesty, truthfulness, reputation and competency of any applicant. The statute makes no provision whatever for notice or opportunity to meet this evidence procured by the commission, nor does it even require that the applicant shall be advised of the nature or the source of the evidence procured by the commission upon which it may refuse to issue a license.

71 It is true that the "Blue Sky" statute of Ohio, the validity of which was sustained in *Hall v. Geiger-Jones Co.* *supra*, authorizes the commissioner to confirm by such investigation as he may deem necessary the references as to good character furnished by the applicant, but that Act protects the applicant by a specific provision for judicial review.

It may be said, however, that the presumption obtains that this statute will be executed in conformity with the due process provisions of the federal and state constitutions; that the authority granted in this act to the commission to promulgate the rules and regulations presupposes that such rules and regulations will be in conformity to law. While it is true that where a statute is possible of more than one construction, that construction will be given it which will sustain its constitutionality, nevertheless, in view of the authorities

heretofore cited to the effect that the statute itself must contain provision for notice and hearing; that notice or hearing as a matter of favor or discretion cannot be accepted as a substantial substitute for the due process of law that the constitution requires, it is very doubtful if any rules or regulations that might be promulgated by this commission would cure this defect in the statute. However, that question is not here presented, for it does not appear from the pleadings in this case that any such rules have been promulgated, although the commission is functioning in manner and form as authorized by the statute.

For the reason above stated this court is unanimously of the opinion that the provisions of Section 8 purporting to confer upon the Tennessee Real Estate Commission authority to obtain ex parte evidence at will, without notice and hearing to the applicant, and without any provision whatever for judicial review is unconstitutional and void.

It is further provided in Section 19 of this Act that should the courts declare any section or provision therein contained unconstitutional, such decision shall effect only the section or provision so declared to be unconstitutional and shall not affect any other section or part of this Act. This provision, of course, does not and cannot confer any legislative power on the court. *Western Union Telegraph Co. v. Myatt*, 98 Fed. 335-347.

72 It is not within the power of any court, State or Federal, to prescribe rules and regulations needful to the welfare, peace, health, safety and morals of the state or the method or manner by which these rules or regulations shall be enforced. That power belongs to the legislature only, and the only question for the court is whether the legislature has exercised that power within constitutional limitations. *State v. Coal Co.*, 96 Fed. 353.

An attempt on the part of a court to amend a specific section of an Act by striking therefrom a part of a fundamental and basic provision and enforcing it as so amended, would be an assumption of legislative power.

If different sections of the same act are independent of each other, that which is unconstitutional may be disregarded and valid sections may stand and be enforced, but this rule has no application in determining the validity of the sections in which the unconstitutional provision is found.

The presumption naturally obtains that the legislature intended every provision of each separate section to be a related and substantial part of the section in which such provision is found. A majority of this court is of the opinion that this provision in Section 8 that offends against the due process clause to the Fourteenth Amendment to the Constitution is fundamental and basic in its character and a related and essential part of the provisions of that section conferring upon the commission authority to exercise its judgment in the issuing of licenses; that if this provision were eliminated it would emasculate the entire section so that in the issuing of licenses the Tennessee Real Estate Commission would be a mere automaton without authority to determine the fundamental

questions of the right of the applicant for a license; that its discretion would be limited solely to determining whether the evidence offered by the applicant conformed to the provisions of the statute and if so, it would be compelled to accept that evidence as conclusive proof of the honesty, truthfulness, reputation and competency of the applicant, regardless of the truth, and that clearly this was not the legislative intent.

As heretofore stated, the validity of such sections of this Act does not necessarily depend upon the validity of Section 8.

73 Especially is this true in view of the provisions of Section 19. These other sections express the legislative intent in the language used by the legislature itself without alteration or elision of any part thereof by the court. If they are wholly independent, separate and apart from Section 8, then they should be enforced in the terms in which they were written by the legislature. On the other hand if Section 8 is so closely related to the valid sections that without it they could serve no purpose within the contemplation of the legislature, then the entire statute must be held inoperative. *Weaver, v. Davidson Co.* 104 Tenn. 315; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 555.

The purpose of this Act is to regulate by license the real estate business of Tennessee. The first step in the proposed regulation of this business is the granting and issuing of licenses as provided by Section 8 of this Act. This section gives color and purpose to every other section in the Act and without which the other sections would be meaningless, the majority of the court being of the opinion that that section is void for the reasons heretofore stated, it is ordered that a temporary injunction issue restraining the Tennessee Real Estate Commission from publishing the names of the Real Estate Brokers and real estate salesmen to whom licenses have been issued and enjoining the Attorney General of the County of Shelby, Tennessee from the prosecution and enforcement of the criminal and penal provisions of this Act as against these complainants until the final hearing of this cause or the further orders of this court.

74 *Petition for Appeal.*

(Filed Oct. 21, 1921.)

To the Honorable, J. W. Ross, Judge of the District Court of the United States for the Western District of Tennessee, Western Division:

Now come the defendants, Ernest Adams, R. W. Bratton, Jno. F. Brownlow and Saml. O. Bates, by their attorneys, and feeling themselves aggrieved by the decree of this court entered on the 20 day of October, 1921, granting a temporary injunction against them enjoining them from performing their duties as officers of the State of Tennessee under Chapter 98 of the Public Acts of the State of Tennessee, for the year 1921, and declaring said Act unconstitutional, null and void, and as violative of the Fourteenth Amend-

ment to the Constitution of the United States, and hereby pray that an appeal may be allowed to them from said decree to the Supreme Court of the United States and, in connection with this petition, your petitioners further pray that the amount of security for the appeal may be fixed by the order allowing this appeal.

THOS. J. JACKSON,

M. M. NEIL,

JAS. L. McREE,

N. W. MACCHESNEY,

Attorneys for Defendants (Appellants).

75

Assignments of Error.

Now come the Appellants, R. W. Bratton, John F. Brownlow and Ernest Adams, composing the Tennessee Real Estate Commission under chapter 98 of the Public Acts of the State of Tennessee, for the year 1921; and Samuel O. Bates, the District Attorney General of the State of Tennessee for the judicial District embracing Shelby County, Tennessee, by their Attorneys Thomas H. Jackson, M. M. Neil and James L. McRee and N. W. MacChesney, and in connection with their petition for appeal in this case say that in the record proceedings and in the interlocutory decree entered in this cause on the 20 day of October, 1921, declaring and adjudging that Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, hereinafter more particularly referred to, is violative of the Fourteenth Amendment to the Constitution of the United States and is unconstitutional, null and void, and granting a temporary injunction, restraining Appellants as Officers of the State of Tennessee from the performance of their duties under said Act, manifest error has intervened to the prejudice of the Appellants, to-wit:

I.

The court erred in holding and decreeing that Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, entitled "An Act to define, regulate and license real estate brokers, real estate salesman; create a State Real Estate Commission, and to provide a penalty for a violation of the provisions hereof", is violative of the Fourteenth Amendment to the Constitution of the United States, and is unconstitutional, null and void, and in thereupon causing to be entered an order or decree in this cause awarding a temporary injunction as prayed for in the Bill of Complaint in this cause, restraining, prohibiting and enjoining as to the complainants and each and every of them, the enforcement, or operation or execution by the Appellants R. W. Bratton, John F. Brownlow and Earnest Adams, composing the Tennessee Real Estate Commission under the said Public Act of the General Assembly of the State of Tennessee for the year 1921, Chapter 98, and in enjoining the said Appellants and each and every of them from publishing a list of the names and addresses of persons as provided for in said Act; all of the appellants being officers of the State of Tennessee, and restraining,

76 prohibiting and enjoining the appellant, Samuel O. Bates, the District Attorney General of the State of Tennessee for Shelby County, Tennessee from the prosecution and enforcement of the penal provisions of the said Act of the General Assembly of the State of Tennessee for the year 1921, under Chapter 98, as against the said complainants, or any one or more of them, for that said Act is not violative of the Fourteenth Amendment to the Constitution of the United States and is not unconstitutional, null and void, but is constitutional and valid.

II.

The Court erred in holding as set forth in its opinion that Section 8 of the said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, referred to in assignment No. 1, is violative of the Fourteenth Amendment to the Constitution of the United States and is unconstitutional, null and void, and in thereupon awarding a decree that the whole Act is unconstitutional, null and void, and in awarding the temporary injunction referred to in Assignment No. 1, *supra*; for that the said Section 8 is not violative of the Fourteenth Amendment and unconstitutional, null and void, but is constitutional and valid.

III.

The Court erred in holding that said Section 8 of Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, particularly referred to in Assignment No. 1, fails to accord applicants for license under said Act a proper and sufficient hearing of a judicial nature, in respect of their right to have issued to them a license under the Act, before deciding the question of such right to receive such license.

IV.

The Court erred in holding that the true construction of the following sentence to-wit: ("The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker's or salesman's license, or of any of the officers or members of any such applicant prior to the issuance of any such license"), occurring in Section 8, of Chapter 98 of the Public Acts of the State of Tennessee
77 for the ~~for~~ *for the* year 1921, particularly referred to in Assignment No. 1, is that the Commission is not to pass solely upon the application and the accompanying evidence required by the Act and furnished by the applicant as to his good reputation, for honesty, competency and fair dealing, but that the said Act authorizes the Commission to not only require the applicant to furnish further evidence, "but also to procure, independent of the applicant, any and all satisfactory proof it may deem desirable in reference to the honesty, truthfulness, reputation and competency of any applicant",

instead of holding as the Court should have held, that the words "require and procure" occurring in Section 8, of the Act should be construed together as meaning that the Commission is authorized to require of the applicant and procure of him through such requirements such additional evidence as may be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any such applicant.

V.

The Court erred in holding that the true construction of the following sentence to-wit ("The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker's or salesman's license, or of any of the officers or members of any such applicant prior to the issuance of any such license"), occurring in Section 8, of Chapter 98, of the Public Acts of the State of Tennessee for the year 1921, particularly referred to in Assignment No. 1, is that the Commission is not to pass solely upon the application and the accompanying evidence required by the Act and furnished by the applicant as to his good reputation for honesty, competency and fair dealing, but that the said Act authorizes the Commission to not only require the applicant to furnish further evidence "but also to procure independent of the applicant, any and all satisfactory proof it may deem desirable in reference to the honesty, truthfulness, reputation and competency of applicant", and that "the Statute makes no provision whatever for notice or opportunity to meet this evidence procured by the Commission, not does it even require that the applicant shall be advised of the nature or the source of the evidence procured by the Commission upon which it may refuse to issue a license:" whereas, the Court should have held, and erred in not holding, that section 8 should be construed in connection with sections fourteen and fifteen of the same Act (the said sections fourteen and fifteen pertaining to the revocation of licenses and appeals therefrom), and being so construed in connection with sections fourteen and fifteen, the clear meaning of the Act is that the applicant shall have a full hearing upon the question of his right to receive his license on all the evidence adduced and before the decision of such question by the Commission.

VI.

The Court erred in refusing and failing to hold that in case a license shall be refused by the Commission to any applicant therefor, under said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, particularly referred to in Assignment No. 1, such applicant can obtain relief in the Courts of the State of Tennessee, if on the merits of controversy entitled thereto, by filing a petition in one of the Circuit Courts of the State of Tennessee for removal of said controversy into said Circuit Court for trial thereof, and decision thereon through the agency of the writ of certiorari

grantable in the State of Tennessee in lieu of appeal in cases wherein no appeal is directly provided for by law; or in case the Commission for any reason shall refuse to hear an application, then that such hearing can be compelled by the writ of mandamus under the laws of Tennessee, by the filing of a petition or bill in either the Circuit Court or the Chancery Court of the State of Tennessee, and that after such hearing the case can be transferred into one of the Circuit Courts of the State of Tennessee under a petition for the aforesaid writ of certiorari, for trial of the controversy on the merits thereof.

VII.

The Court erred in holding that in order to be valid under the Constitution of the United States and the Fourteenth Amendment thereto, said chapter 98 of the Public Acts of the State of Tennessee for the year 1921, particularly referred to in Assignment No. 1, *supra*, must or should on its face, and by its own terms, grant to applicants for license the right to a judicial hearing of said matter by the Commission itself or some other body possessed of judicial powers, and that resort cannot be had to other statutes of the State of Tennessee or to the decisions of the Supreme Court of Tennessee,

the State's highest court, and its court of last resort, for the purpose of showing in support of said Act that such right of a judicial hearing is available to applicants for such license in any case in which the Commission shall fail or refuse to grant a license under the Act, even if it be true that no such duty of granting a judicial hearing is imposed upon the Commission itself by the terms of the Act.

VIII.

The Court erred in failing to hold that the failure of the State of Tennessee in said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, particularly referred to in Assignment No. 1, if there was in fact such failure, to make provision in the Act for a hearing of a judicial nature by the Commission itself, or by some other body having judicial powers, of the application for license under the Act, did not invalidate the Act, it appearing from the face of the Act that it does not deny the applicant the right of access to the Courts for determining any matter which would be an appropriate subject of judicial inquiry, and the Court erred in holding said Act unconstitutional and in granting a temporary injunction referred to in Assignment No. 1, notwithstanding no such fact was stated or shown in the bill of complaint or in the record.

IX.

The Court erred in granting a temporary injunction on the motion made therefor in the absence of an allegation in the bill, or a showing in the record, that it had been made to appear or was true as a fact, that in the actual administration of the said Chapter 98 of the

Public Acts of the State of Tennessee, particularly referred to in Assignment No. 1, the Commission had been guilty of an arbitrary or oppressive exercise of the power conferred on them by the Act in the refusal of licenses to complainants or either of them, or to one of the, or to some other person or applicant.

X.

The Court erred in adjudicating the question of the constitutionality of the said Act, Chapter 98 of the Public Acts of the State of Tennessee, particularly referred to in Assignment No. 1, and in granting the temporary injunction in this case, in advance of any decision of the Supreme Court of the State of Tennessee on the subject of the Constitutionality of the Act, in the absence of any showing in the bill in this case that the case imperatively demands such advance decision, there being nothing stated in the bill or appearing in the record showing such imperative demand or pressing necessity.

XI.

The Court erred in failing and refusing to hold that the words in the 8th Section of said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921 (said Act particularly referred to in Assignment No. 1, vesting the Commission with the discretionary power to procure "any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant", in addition to such as might be furnished voluntarily by the applicant, or be furnished on requirement made of him by the Commission (if such be the true construction of said Section 8, which appellants do not admit), could be excised by the Court and the Act saved; and erred in holding that this discretionary power is so vital and so intertwined with and woven into said Section 8, that it would not be cut out for the purpose of saving the Act, the Act having been held by the Court in all other respects constitutional and valid, but for said offending discretionary power; whereas the Court should have held that said offending matter might be stricken out and the Act saved; and should have decreed that the Act was constitutional and valid; and erred in not so holding and in granting the temporary injunction.

XII.

The Court erred in declaring said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, unconstitutional and in granting the temporary injunction referred to in Assignment No. 1, because it does not appear from the bill of complaint that either of the complainants suffered, or would suffer from the objectionable matter found by the Court in Section 8 of the Act as appearing in its opinion, authorizing the Commission to procure evidence independently of the applicant and to act on same without calling his attention thereto and giving him an opportunity to reply to the

same, prior to the action of the Commission upon such application; for that it does not appear from the bill of complaint or elsewhere in the record, that either of the complainants has applied for a license under the Act, and that if such an application were made such discretionary power to procure other evidence would be applied to them or either of them, or has ever been applied to any applicant
whatsoever, or that a full and satisfactory hearing would not
81 be granted to them without resort to such discretionary power to procure such additional evidence.

Wherefore Appellants pray that the decree of the said District Court of the United States for the Western District of Tennessee, Western Division, may be reversed.

THOS. H. JACKSON,
M. M. NEIL,
JAS. L. McREE,
N. W. MACCHESNEY,
Attorneys for Appellants.

82 *Order Allowing Appeal.*

Entered October 21, 1921. J. W. Ross, Judge.

On reading the petition of the appellants, R. W. Bratton, Ernest Adams, John F. Brownlow and Samuel O. Bates, (defendants in the above styled case), for appeal to the Supreme Court of the United States, and on due consideration of the assignments of error presented therewith, and of the record of said cause, it is ordered that the appeal as prayed for in said petition be and the same is herewith allowed, and that a citation thereon be issued and served, and returned to the Supreme Court of the United States in accordance with the law, upon condition that the said petitioners, (appellants) R. W. Bratton, Ernest Adams, John F. Brownlow and Samuel O. Bates give security in the sum of One Thousand Dollars; that the appellants shall prosecute said appeal to effect, and if said appellants fail to make their plea good shall answer to the complainants, (appellees) for all costs and damages that may be adjudged or decreed on account of said appeal.

And the said appellants now presenting a bond in the sum of One Thousand Dollars with American Surety Company of New York as surety, it is ordered that the same be and hereby is duly approved.

In witness whereof I have hereunto set my hand this 21st day of October, 1921.

J. W. ROSS,
*Judge of District Court of United States for
Western District of Tennessee, Western Division.*

Bond on Appeal.

(Filed Oct. 21, 1921.)

Know all men by these presents: That we, Ernest Adams, R. W. Bratton, John F. Brownlow and Samuel O. Bates, as Principal, and American Surety Company of New York, as sureties, are held and firmly bound unto Wm. C. Chandler and Jas. E. Walden, individually and as co-partners under the firm name and style of "Chandler & Walden," Charles T. Wadlington and Leonard W. Wadlington, individually and as co-partners under the firm name and style of "Washington Brothers," N. I. Kabakoff and L. S. Powell, individually and as co-partners under the name and style of "Independent Realty Company," M. O. Allen, doing business under the firm name and style of "National Realty Company," C. A. Cleaves and J. B. Whitten, individually and as co-partners under the firm name and style of "Cleaves & Whitten," A. M. Johnson, C. M. Halford, F. M. McNath and S. E. Lemonds, individually and as co-partners under the firm name and style of "McMath & Lemonds," S. D. English, M. G. South, Geo. H. Glascock, C. A. Jones, O. S. Maiden, J. T. Thomas, doing business under the style of "Thomas Realty Company," R. Graham Bostwick, A. C. Floyd, P. M. Mobley, Ralph Graham, H. M. Hall, H. L. Higgs, J. N. Cathey, J. T. Gardner, B. M. Kellem, J. L. Hall, O. S. Allen, H. B. Willis, B. F. Whitten, J. A. Haley, H. W. Miller, Sam Bowen, Jason Walker, McKinney Land & Investment Co., a body politic and corporate, and Washington Real Estate Company, a body politic and corporate, complainants, in the full and just sum of One Thousand (\$1,000.00) Dollars, to be paid to the said Wm. C. Chandler and the other complainants, whose names are hereinabove set out, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 21st day of October, in the Year of our Lord One Thousand Nine Hundred and Twenty-One.

Whereas, lately at a term of the District Court of the United States for the Western District of Tennessee, Western Division, in a suit depending in said court between Wm. C. Chandler, and Jas. E. Walden, individually and as co-partners under the firm name and style of "Chandler & Walden," Chas. T. Wadlington and Leonard W. Wadlington individually and as co-partners under the firm name and style of "Wadlington Brothers," N. I. Kabakoff and L. S. Powell, individually and as co-partners under the firm name and style of "Independent Realty Company," M. O. Allen, doing business under the firm name and style of "National Realty Company," C. A. Cleaves and J. B. Whitten, individually and as co-partners under the firm name and style of "Cleaves & Whitten," A. M. Johnston, C. M. Halford, F. M. McMath and S. E. Lemonds, individually and as co-partners under the firm name and style of "McMath & Lemonds," S. D. English, M. G. South, George H. Glascock, C. A. Jones, O. S. Maiden, J. T. Thomas, doing business under the style and name of

"Thomas Realty Company," R. Graham Bostwick, A. C. Floyd, P. M. Mobley, Ralph Graham, H. M. Hall, H. L. Higgs, J. N. Cathey, J. T. Gardner, B. M. Kellum, J. L. Hall, O. S. Allen, H. B. Willis, B. F. Whitten, J. A. Haley, H. W. Miller, Sam Bowen, Jason Walker, McKinney Land & Investment Company, a body politic and corporate, and Washington Real Estate Company, a body politic and corporate, complainants, and Ernest Adams, R. W. Bratton, Jno. F. Brownlow and Samuel O. Bates, defendants, a decree was rendered in favor of said complainants, and against the said defendants, Ernest Adams, R. W. Bratton, Jno. F. Brownlow and Samuel O.

Bates, awarding, a temporary injunction against the said defendants, restraining, prohibiting and enjoining as to the complainants, and each and every of them, the defendants R. W. Bratton, Ernest Adams and Jno. F. Brownlow, composing the Tennessee Real Estate Commission appointed under Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, and each and every of them, from publishing a list of the names and addresses of persons as provided for in said Act, and restraining, prohibiting and enjoining defendant, Samuel O. Bates, Attorney General of Shelby County, Tennessee, from the prosecution and enforcement of the penal provisions of said Act of the General Assembly of the State of Tennessee, as against the said complainants, or any one or more or all of them, and adjudging that said Chapter 98 is violative of the Fourteenth Amendment to the Constitution of the United States and is unconstitutional, null and void; and the said R. W. Bratton, Ernest Adams, Jno. F. Brownlow and Samuel O. Bates having obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit of Wm. C. Chandler et al. vs. R. W. Bratton et al.;

Now, the condition of the above obligation is such that if the said defendants, R. W. Bratton, Ernest Adams, Jno. F. Brownlow and Samuel O. Bates, shall prosecute their appeal to effect, and will pay and answer all damages and cost if they shall fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ERNEST ADAMS,

[SEAL.]

R. W. BRATTON,

[SEAL.]

By M. M. NEIL,

Atty.;

JNO. F. BROWNLOW,

[SEAL.]

By M. M. NEIL,

Atty.;

SAMUEL O. BATES,

[SEAL.]

By M. M. NEIL,

Atty.;

Principals.

AMERICAN SURETY COMPANY OF
NEW YORK,

By HERBERT F. SHARMAN,

Resident Vice President,

Surety.

Signed and sealed in the presence of:

J. L. McREE,

B. BOONE.

Attest:

CLIFFORD P. KULP,

Asst. Rec. Secretary.

Approved by—

J. W. ROSS,

Judge of the U. S. District Court,

Western Division, Western District of Tennessee.

85

Citation on Appeal.

UNITED STATES OF AMERICA, *ss.*:

To:

William C. Chandler and James E. Walden, individually and as co-partners under the firm name and style of "Chandler & Walden;"

Charles T. Wadlington and Leonard W. Wadlington, individually and as co-partners under the firm name and style of "Wadlington Brothers;"

N. I. Kabakoff and L. S. Powell, individually and as co-partners under the firm name and style of "Independent Realty Company;"

M. O. Allen, doing business under the firm name and style of "National Realty Company;"

C. A. Cleaves and J. B. Whitten, individually and as co-partners under the firm name and style of "Cleaves & Whitten;"

A. M. Johnston,

C. M. Halford;

F. M. McMath and S. E. Lemonds, individually and as co-partners under the firm name and style of "McMath & Lemonds;"

S. D. English,

M. G. South,

George H. Glascock,

C. A. Jones,

O. S. Maiden;

J. T. Thomas, doing business under the style of "Thomas Realty Company;"

R. Graham Bostwick,

A. C. Floyd,

P. M. Mobley,

Ralph Graham,

H. M. Hall,

H. L. Higgs,

J. N. Cathey,

J. T. Gardner,

86 B. M. Kellem,
J. L. Hall,
O. S. Allen,
H. B. Willis,
B. F. Whitten,
J. A. Haley,
H. W. Miller,
Sam Bowen,
Jason Walker,

All of whom are residents and citizens of the City of Memphis, in the County of Shelby, in the State of Tennessee, and inhabitants of the Western District of the State of Tennessee;

McKinney Land & Investment Co., a body politic and corporate, and Washington Real Estate Company, a body politic and corporate, each being organized under the laws of the State of Tennessee, and having its situs or principal place of business in Memphis, in said State of Tennessee, and being a citizen of the State of Tennessee,

Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Western District of Tennessee, Western Division, wherein R. W. Bratton, Ernest Adams and Jno. F. Brownlow, who are sued in their capacities as members of and as constituting the Tennessee Real Estate Commission, and Samuel O. Bates, who is sued as Attorney General of the County of Shelby, Tennessee, and as a public officer charged with the prosecution and enforcement of criminal and penal statutes in Shelby County, Tennessee, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned and adjudging unconstitutional, null and void as violative of the Fourteenth Amendment to the Constitution of the United States, Chapter 98 of the Public Acts of the General Assembly of the State of Tennessee for the year 1921, should not be corrected and why speedy justice should not be done to the parties in that behalf.

87

Witness the Honorable J. W. Ross, Judge of the District Court of the United States for the Western District of Tennessee, Western Division, this 21 day of October, in the year of our Lord One Thousand Nine Hundred and Twenty-one.

[Seal of the District Court of the United States, Western Judicial District of Tennessee.]

J. W. ROSS,
*Judge of the U. S. District Court, Western
District of Tennessee, Western Division.*

As attorneys for the complainants in the case of Wm. C. Chandler et al. vs. R. W. Bratton et al., in the District Court of the United States for the Western District of Tennessee, Western Division, we hereby acknowledge service of the within citation, and the receipt of a copy of the said citation.

This 21st day of October, 1921.

JULIUS C. WILSON,
WALTER P. ARMSTRONG,
ELIAS GATES,
Attorneys for Complainants, Appellees.

88 *Order Extending Time to Complete Transcript on Appeal.*

Entered November 19, 1921. J. W. Ross, Judge.

In this cause it appearing that additional time is necessary in which to complete the transcript of record and proceedings had herein, and for filing same in United States Circuit Court of Appeals, for this, the Sixth Judicial Circuit.

It is therefore ordered by the Court that the time be, and is, extended thirty days from November 19th, 1921, for completing and filing said transcript of record and proceedings had herein in the United States Circuit Court of Appeals, and the same additional time be allowed the appellants within which to make the deposit of \$35.00 required by Rule 16 of the said Appellate Court.

89 THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit:

District Court of the United States, Western District of Tennessee.

I, J. Sam Johnson, Clerk of the District Court of the United States, for the Western District of Tennessee, do hereby certify that the papers hereto attached, are full, true, perfect and correct copies of the originals and of the record and proceedings had, in accordance with preceipe for record, including the Original Preceipe and Citation in said Court as the same now appears of record and upon the files in my office, in the following cause, to-wit: William C. Chandler et als. versus R. W. Bratton et als., No. 768, In Equity.

In Testimony Whereof, I have hereunto written my name and affixed the Seal of said Court, at my office in the City of Memphis, Tennessee, this 15th day of December, A. D. 1921, and of the Independence of the United States the 146th Year.

[Seal of the District Court of the United States, Western Judicial District of Tennessee.]

J. SAM JOHNSON,
Clerk.

Authentication.

I, J. W. Ross, a Judge of said Court, do hereby certify that J. Sam Johnson, whose genuine signature appears to the foregoing certificate is, and was at the date of the same, Clerk of said Court and that his attestation is in due form.

J. W. ROSS,

*Judge of the District Court of the United
States for the District aforesaid.*

90 In the Supreme Court of the United States, at the October Term, 1921.

No. —.

R. W. BRATTON et al., Appellants,

vs.

WILLIAM C. CHANDLER and JAMES E. WALDON, Individually and as Copartners under the Firm Name and Style of "Chandler & Waldon;" Chas. T. Wadlington and Leonard W. Wadlington, Individually and as Copartners under the Firm Name and Style of "Wadlington Brothers;" N. I. Kabakoff and L. S. Powell, Individually and as Copartners under the Firm Name and Style of "Independent Realty Company;" M. O. Allen, Doing Business under the Firm Name and Style of "National Realty Company;" C. A. Cleaves and J. B. Whitton, Individually and as Copartners under the Name and Style of "Cleaves & Whitton;" F. M. McMath and S. E. Lemonds, Individually and as Copartners under the Firm Name and Style of "McMath & Lemonds;" J. T. Thomas, Doing Business under the Style of "Thomas Realty Company;" A. M. Johnston, C. M. Halford, S. D. English, M. C. South, Geo. H. Glascock, C. A. Jones, O. S. Maiden, R. Graham Bostwick, A. C. Floyd, P. M. Mobley, Ralph Graham, H. M. Hall, H. L. Higgs, J. N. Cathey, J. T. Gardner, B. M. Kellem, J. L. Hall, O. S. Allen, H. B. Willis, B. F. Whitten, J. A. Haley, H. W. Miller, Sam Bowen, Jason Walker, Appellees.

Appeal from the District Court of the United States for the Western Division of the Western District of Tennessee.

To Julian C. Wilson, Elias Gates, and Walter P. Armstrong, attorneys for appellees in above-entitled cause:

We herewith serve upon the Appellees above named, by delivery to you, for each of them, a copy of the statement of errors upon which the Appellants, in the above entitled cause, intend to rely, and of the parts of the record which the Appellants think necessary for the consideration thereof.

This the 31st day of December, 1921.

M. M. NEIL,

F. M. THOMPSON,

NATHAN WILLIAM MacCHESNEY,

Attorneys for Appellants.

Service of the foregoing notice, this the 31 day of December, 1921, is hereby acknowledged for each of the Appellees, also service of the statement therein referred to.

JULIAN C. WILSON,
WALTER P. ARMSTRONG,
ELIAS GATES,

Attorneys for Appellees.

92 *Designation of Record for Printing and of Errors Intended to be Relied on under Rule 10, Subdivision 9, of the Supreme Court of the United States.*

In the Supreme Court of the United States, at the October Term, 1921.

No. —.

R. W. BRATTON et al., Appellants,

vs.

WM. C. CHANDLER et al., Appellees.

Appeal from the District Court of the United States for the Western Division of the Western District of Tennessee.

The appellants by M. M. Neil, F. M. Thompson and Nathan William MacChesney, attorneys, present the following statement of errors upon which the appellants intend to rely in the above case, and of the parts of the record which plaintiffs in error think necessary for consideration thereof. The errors *indented* to be relied upon are the same which were assigned in the District Court with the petition for appeal therein, as follows:

93 *"Assignments of Error.*

In the District Court of the United States for the Western District of Tennessee, Western Division.

In Equity.

No. 768.

WM. C. CHANDLER et al., Complainants,

vs.

R. W. BRATTON et al., Defendants.

Now come the appellants, R. W. Bratton, Jno. F. Brownlow and Ernest Adams, composing the Tennessee Real Estate Commission, under Chapter 98 of the Public Acts of the State of Tennessee for

the year 1921; and Samuel O. Bates, the District Attorney General of the State of Tennessee for the Judicial District embracing Shelby County, Tennessee, by their attorneys Thomas H. Jackson, M. M. Neil and James L. McRee and N. W. MacChesney, and in connection with their petition for appeal in this case say that in the record proceedings and in the interlocutory decree entered in this cause on the — day of October, 1921, declaring and adjudging that Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, hereinafter more particularly referred to, is violative of the Fourteenth Amendment to the Constitution of the United States and is unconstitutional, null and void, and granting a temporary injunction, restraining appellants as officers of the State of Tennessee
 94 from the performance of their duties under said Act, manifest error has intervened to the prejudice of the appellants, to-wit:

I.

The Court erred in holding and decreeing that Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, entitled "An Act to define, regulate and license real estate brokers, real estate salesmen; create a State Real Estate Commission, and to provide a penalty for a violation of the provisions hereof", is violative of the Fourteenth Amendment to the Constitution of the United States, and is unconstitutional, null and void, and in thereupon causing to be entered an order or decree in this cause awarding a temporary injunction as prayed for in the Bill of complaint in this cause, restraining, prohibiting and enjoining as to the complainants and each and every of them, the enforcement, or operation or execution by the appellants R. W. Bratton, John F. Brownlow and Ernest Adams, composing the Tennessee Real Estate Commission under the said Public Act of the General Assembly of the State of Tennessee for the year 1921, Chapter 98, and in enjoining the said appellants and each and every of them from publishing a list of the names and addresses of persons as provided for in said Act; all of the appellants being officers of the State of Tennessee, and restraining, prohibiting and enjoining the appellant, Samuel O. Bates, the District Attorney General of the State of Tennessee for Shelby County, Tenn., from the prosecution and enforcement of the penal provisions of the said Act of the General Assembly of the State of Tennessee for the year 1921, under Chapter 98, as against the said complainants, or any one or more of them, for that said Act is not violative of the Fourteenth Amendment to the Constitution of the United
 95 States and is not unconstitutional, null and void, but is constitutional and valid.

II.

The Court erred in holding as set forth in its opinion that Section 8 of the said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, referred to in Assignment No. 1, is violative of the Fourteenth Amendment to the Constitution of the United States, and is unconstitutional, null and void, and in there-

upon awarding a decree that the whole Act is unconstitutional, null and void, and in awarding the temporary injunction referred to in Assignment No. 1, *supra*; for that the said section 8 is not violative of the Fourteenth Amendment and unconstitutional, null and void, but is constitutional and valid.

III.

The Court erred in holding that said Section 8 of Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, particularly referred to in Assignment No. 1, fails to accord applicants for license under said Act a proper and sufficient hearing of a judicial nature, in respect of their right to have issued to them a license under the Act, before deciding the question of such right to receive such license.

IV.

The Court erred in holding that the true construction of the following sentence to-wit: ("The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker's or salesman's license, or of any of the officers or members of any such applicant prior to the issuance of any such license"), occurring in section 8,

of Chapter 98 of the Public Acts of the State of Tennessee for 96 the year 1921, particularly referred to in Assignment No. 1,

is that the Commission is not to pass solely upon the application and the accompanying evidence required by the Act and furnished by the applicant as to his good reputation, for honesty, competency and fair dealing, but that the said Act authorizes the Commission to not only require the applicant to furnish further evidence, "but also to procure, independent of the applicant, any and all satisfactory proof it may deem desirable in reference to the honesty, truthfulness, reputation and competency of any applicant", instead of holding as the Court should have held, that the words "require and procure," occurring in section 8 of the Act, should be construed together as meaning that the Commission is authorized to require of the applicant and procure of him through such requirement such additional evidence as may be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any such applicant.

V.

The Court erred in holding that the true construction of the following sentence to-wit: ("The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker's or salesman's license, or of any of the officers or members of any such applicant prior to the issuance of any such license"), occurring in Section 8, of Chapter 98 of the Public Acts of the State of Tennessee for the

year 1921, particularly referred to in Assignment No. 1, is that the Commission is not to pass solely upon the application and the accompanying evidence required by the Act and furnished by the applicant as to his good reputation for honesty, competency and fair dealing, but that the said Act authorized the Commission to not only require the applicant to furnish further evidence "but also to procure, independent of the applicant, any and all satisfactory proof it may deem desirable in reference to the honesty, truthfulness, reputation and competency of any applicant", and that "the statute makes no provision whatever for notice or opportunity to meet this evidence procured by the Commission, nor does it even require that the applicant shall be advised of the nature or the source of the evidence procured by the Commission upon which it may refuse to issue a license;" whereas, the Court should have held, and erred in not holding, that section 8 should be construed in connection with sections Fourteen and Fifteen of the same Act (the said sections Fourteen and Fifteen pertaining to the revocation of licenses and appeals therefrom), and being so construed in connection with sections Fourteen and Fifteen, the clear meaning of the Act is that the applicant shall have a full hearing upon the question of his right to receive his license on all the evidence adduced and before the decision of such question by the Commission.

VI.

The Court erred in refusing and failing to hold that in case a license shall be refused by the Commission to any applicant therefor, under said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, particularly referred to in Assignment No. 1, such applicant can obtain relief in the Courts of the State of Tennessee, if on the merits of the controversy entitled thereto, by filing a petition in one of the Circuit Courts of the State of Tennessee for removal of said controversy into said Circuit Court for trial thereof, and decision thereon through the agency of the writ of certiorari grantable in the State of Tennessee in lieu of appeal in cases wherein no appeal is directly provided for by law; or in case the Commission for any reason shall refuse to hear an application, then that such hearing can be compelled by the writ of mandamus under the laws of Tennessee, by the filing of a petition or bill in either the Circuit Court or the Chancery Court of the State of Tennessee, and that after such hearing the case can be transferred into one of the Circuit Courts of the State of Tennessee under a petition for the aforesaid writ of certiorari, for trial of the controversy on the merits thereof.

VII.

The Court erred in holding that in order to be valid under the Constitution of the United States and the Fourteenth Amendment thereto, said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, particularly referred to in Assignment No. 1,

supra, must or should, on its face, and by its own terms, grant to applicants for license the right to a judicial hearing of said matter by the Commission itself or some other body possessed of judicial powers, and that resort cannot be had to other statutes of the State of Tennessee or to the decisions of the Supreme Court of Tennessee, the State's highest court, and its court of last resort, for the purpose of showing in support of said Act that such right of a judicial hearing is available to applicants for such license in any case in which the Commission shall fail or refuse to grant a license under the Act, even if it be true that no such duty of granting a judicial hearing is imposed upon the Commission itself by the terms of the Act.

VIII.

99 The Court erred in failing to hold that the failure of the State of Tennessee in said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, particularly referred to in Assignment No. 1, if there was in fact such failure, to make provision in the Act for a hearing of a judicial nature by the Commission itself, or by some other body having judicial powers, of the application for license under the Act, did not invalidate the Act, it appearing from the face of the Act that it does not deny the applicant the right of access to the Courts for determining any matter which would be an appropriate subject of judicial inquiry, and the Court erred in holding said Act unconstitutional and in granting a temporary injunction referred to in Assignment No. 1, notwithstanding no such fact was stated or shown in the bill of complaint or in the record.

IX.

The Court erred in granting a temporary injunction on the motion made therefor in the absence of an allegation in the bill, or a showing in the record, that it had been made to appear or was true as a fact, that in the actual administration of the said Chapter 98 of the Public Acts of the State of Tennessee, particularly referred to in Assignment No. 1, the Commission had been guilty of an arbitrary or oppressive exercise of the power conferred on them by the Act in the refusal of license to complainants or either of them, or to one of them, or to some other person or applicant.

X.

100 The Court erred in adjudicating the question of the constitutionality of the said Act, Chapter 98 of the Public Acts of the State of Tennessee, particularly referred to in Assignment No. 1, and granting the temporary injunction in this case, in advance of any decision of the Supreme Court of the State of Tennessee on the subject of the Constitutionality of the Act, in the absence of any showing in the bill in this case that the case imperatively demands such advance decision there being nothing stated in the bill or appearing in the record showing such imperative demand or pressing necessity.

XI.

The Court erred in failing and refusing to hold that the words in the 8th Section of said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921 (said Act particularly referred to in Assignment No. 1), vesting the Commission with the discretionary power to procure "any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant", in addition to such as might be furnished voluntarily by the applicant, or be furnished on requirement made of him by the Commission (if such be the true construction of said Section 8, which appellants do not admit), could be excised by the Court and the Act saved; and erred in holding that this discretionary power is so vital and so intertwined with and woven into said Section 8, that it could not be cut out for the purpose of saving the Act, the Act having been held by the Court in all other respects constitutional and valid, but for said offending discretionary power; whereas the Court should have held that said offending matter might be stricken out and the Act saved; and should have decreed that the Act was constitutional and valid; and erred in not so holding and in granting the temporary injunction.

XII.

101 The Court erred in declaring said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, unconstitutional and in granting the temporary injunction referred to in Assignment No. 1, because it does not appear from the bill of complaint that either of the complainants has suffered, or would suffer from the objectionable matter found by the Court in Section 8 of the Act as appearing in its opinion authorizing the Commission to procure evidence independently of the applicant and to act on same without calling his attention thereto and giving him an opportunity to reply to the same, prior to the action of the Commission upon such application; for that it does not appear from the bill of complaint or elsewhere in the record, that either of the complainants has applied for a license under the Act, and that if such an application were made such discretionary power to procure other evidence would be applied to them or either of them, or has ever been applied to any applicant whatsoever, or that a full and satisfactory hearing would not be granted to them without resort to such discretionary power to procure such additional evidence.

Wherefore Appellants pray that the decree of the said District Court of the United States for the Western District of Tennessee, Western Division, may be reversed.

THOMAS H. JACKSON,
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Attorneys for Appellants."

102 The appellants also state that they consider the whole of the record necessary for the consideration of the errors upon which they intend to rely.

Respectfully submitted,

M. M. NEIL,
F. M. THOMPSON,
NATHAN WILLIAM MACCHESNEY,
Attys. for Appellants.

103 [Endorsed:] File No. 28,630. Supreme Court U. S., October Term, 1921. Term No. 675. R. W. Bratton, et al., appts., vs. Wm. C. Chandler et al. Statement of errors to be relied upon and designation by appellants of parts of record to be printed. Filed Jan. 2, 1922.

Endorsed on cover: File No. 28,630. W. Tennessee D. C. U. S. Term No. 675. R. W. Bratton, Ernest Adams, and John F. Brownlow, &c., et al., appellants, vs. William C. Chandler and James E. Walden, individually and as copartners under the firm name and style of Chandler & Walden, et al. Filed January 3d, 1922. File No. 28,630.



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IN THE
Supreme Court of the United States
OCTOBER TERM, 1921.

R. W. BRATTON, ET AL.,
Appellants,

vs.

No.  239

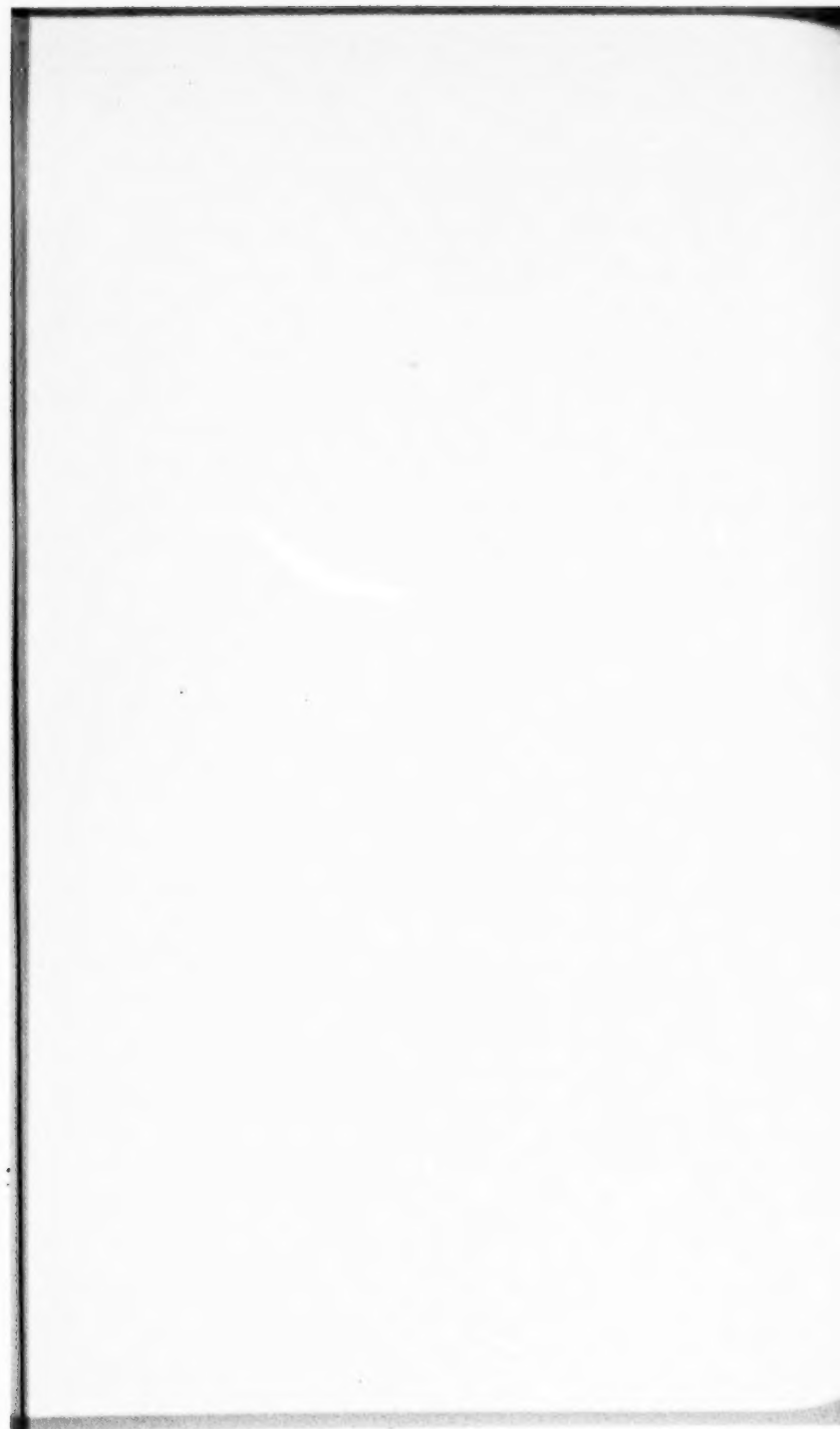
WILLIAM C. CHANDLER, ET AL.,
Appellees.

BRIEF AND ARGUMENT.

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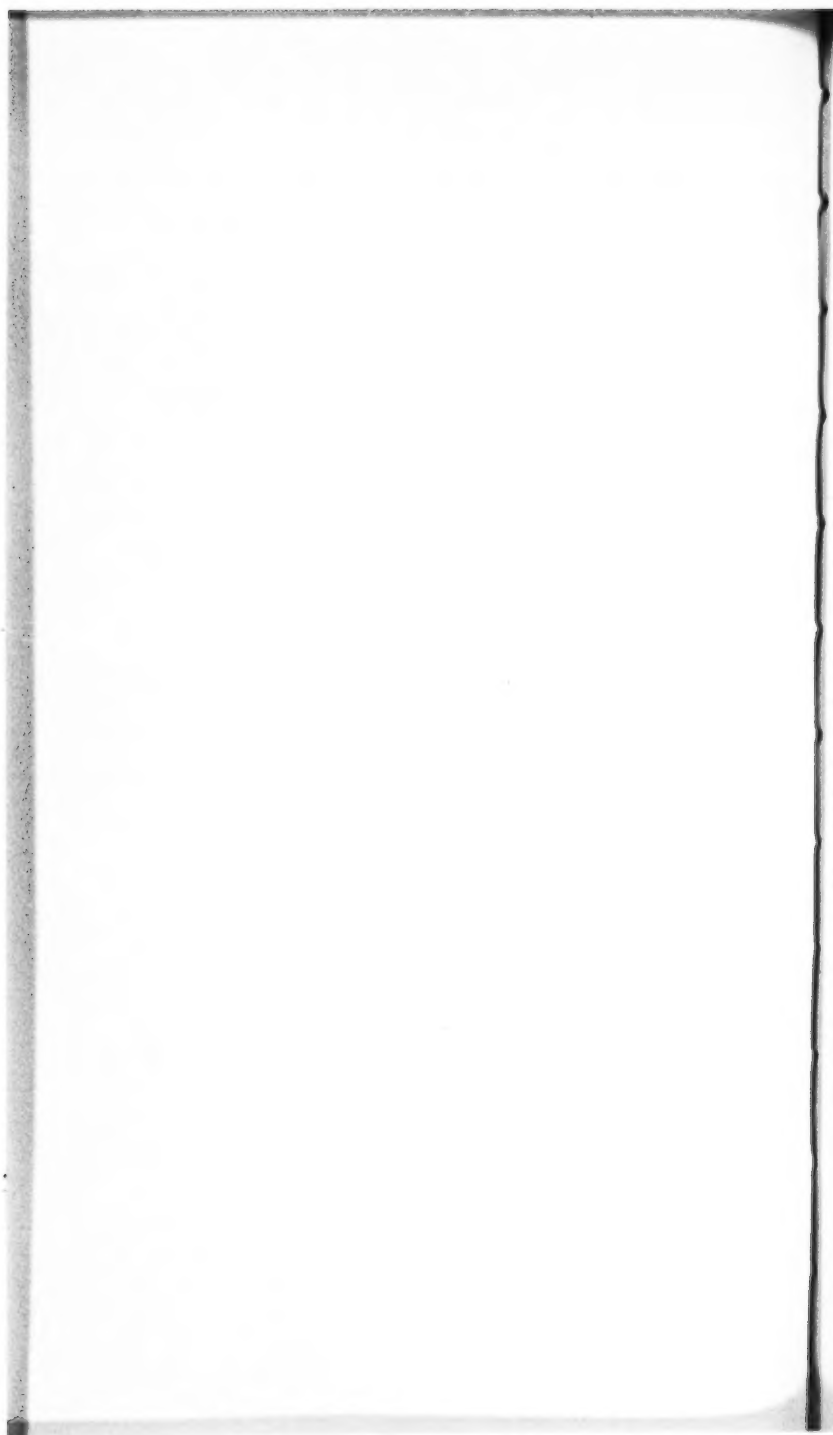
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1921.

R. W. BRATTON, ET AL.,
Appellants,

vs.

No. 675.

WILLIAM C. CHANDLER, ET AL.,
Appellees.

BRIEF AND ARGUMENT.

STATEMENT OF THE CASE.

On July 5, 1921, in the District Court of the United States for the Western Division of the Western District of Tennessee an original bill in equity (R-6—Print 4) was filed by appellees, William C. Chandler and thirty-six other persons, against appellants R. W. Bratton, Ernest Adams and John F. Brownlow, constituting the Tennessee Real Estate Commission, appointed by the Governor, pursuant to House Bill No. 623, Chapter 98 of the Public Acts of 1921 of the State of Tennessee (R. 42, Pr. 27). Samuel O. Bates, District Attorney General of Tennessee, for the district embracing Shelby County, was also made a defendant.

The act was passed to regulate and license real estate brokers and real estate salesmen, creating for that purpose a state real estate commission, and defining its powers and duties.

The bill alleged that appellees, plaintiffs below, were real estate brokers and salesmen respectively, in real estate offices in Tennessee, who were already duly licensed as such under a prior statute (Acts of 1919, Ch. 182) at the time the statute of 1921 was passed; that the latter statute purported to regulate the business of real estate agents and real estate salesmen, and confided the administration thereof to the aforesaid Tennessee Real Estate Commission.

It alleged that the Act of 1921 was unconstitutional and void because violative, in many specified particulars (hereinafter set forth), of the Fourteenth Amendment to the Constitution of the United States and of Article One, Section Eight of the Constitution of the State of Tennessee.

An amendment (R. 38, Pr. 25) stated additional grounds.

The bill prayed that an interlocutory injunction be granted, restraining the enforcement of the statute by the Commission and by the District Attorney General because of such alleged unconstitutionality, and that on final hearing the injunction be made perpetual.

On the same day a motion for the interlocutory injunction was made by the appellees, and a tem-

porary restraining order obtained, pending the hearing of the motion set for a later day (R. 23, Pr. 16).

Appellants filed an answer to the original bill on July 22, 1921 (R. 26, Pr. 17), and to the amendment on July 26, 1921 (R. 49, Pr. 36). These answers responded *seriatim* to the various allegations of the bill and of the amendment, and challenged the correctness of each of them.

On August 4, 1921, the motion for an interlocutory injunction was heard before the Hon. M. H. Donahue, Circuit Judge, and Honorables E. T. Sanford and J. W. Ross, District Judges, pursuant to Section 266 of the Judicial Code and taken under advisement, the temporary restraining order being continued in force until the disposition of the motion for an interlocutory injunction (R. 55, Pr. 40).

On October 4, 1921, a decree was rendered by the three judges, declaring the Act unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States and granting the interlocutory injunction prayed for, on the single ground that Section Eight of the Act did not grant to applicants for license a hearing on the question as to whether such applicants were entitled to license, and that this section was of such importance in the general scheme of the statute as that its invalidity made the whole Act void (R. 56, Pr. 40).

By consent the opinion filed by the judges was made a part of the record. (R. 57, Pr. 41).

This opinion discloses that the Court based its decree upon its construction of a single sentence in Section Eight, although the sentence is not specifically quoted either in the opinion or in the decree (R. 69-74, Pr. 50-53).

That sentence is:

“The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker’s or salesman’s license, or of any of the officers or members of any such applicant, prior to the issuance of any such license.”

The opinion of the Court shows the judges held that substantially all of the other specifications on the subject of unconstitutionality in the bill and the amendment thereto were without merit (R. 61-69, Pr. 43-50). The same fact is indicated by the silence of the decree upon other points and the fact that it placed the unconstitutionality of the statute upon the single ground above stated.

The Act is printed as an appendix to this brief.

A petition for appeal direct to this Court was duly filed, the prayer granted and bond executed and approved (R. 82-85, Pr. 59-62).

In the original bill and the amendment thereto, the appellees challenged the constitutionality of the statute on the following grounds:

(1) That Section "1" of the Act discriminates in favor of corporations in that while it provides that it shall be unlawful for any person, firm, partnership, association or co-partnership to engage in the business or capacity of a real estate broker or real estate salesman within the state without first obtaining a license under the provisions thereof, it omits corporations (R. 10, Pr. 6).

(2) That the Act is vague, indefinite and uncertain, in that while Section "1" prescribes that persons to be licensed shall be such as are competent to transact the business of a real estate broker or real estate salesman, in such manner as to safeguard the interests of the public, it fails to define the word "competent" or to indicate any standard of competency, but leaves this matter wholly to the discretion of the members of the Commission (R. 11, Pr. 7).

(3) That while Section Eight of the Act provides that all applications for license shall be made in writing to the Commission and that the application shall be accompanied by a certain recommendation and that the applicant shall furnish certain information to the Commission, yet it is nowhere made mandatory or imperative on the Commission to issue a license even if the applicant shall comply with the provisions of Section Eight (R. 11, Pr. 7).

(4) That the Act nowhere makes provision for any regular or fixed meetings of the Commission, and that there is nowhere in the statute a special provision for a hearing, or authority in the Commission to summon witnesses or compel them to testify in the event that the Commission shall refuse a license to any applicant (R. 11, Pr. 7).

(5) That the Act excepts persons holding a duly executed power-of-attorney from the owner, for the sale, leasing or exchange of real estate, and thereby denies appellees the equal protection of the laws (R. 11-12, Pr. 8).

(6) That Section Three of the Act provides "That one Act for a compensation or valuable consideration of buying or selling real estate of or for another . . . shall constitute the person . . . a real estate broker or a real estate salesman within the meaning of this Act, and thereby violates the Constitution of the United States and of the State of Tennessee, because one act does not, and the Legislature cannot make the doing of any one act the equivalent of engaging in a business defined by such statute."

(7) That Section Nine provides that a notice in writing shall be given to the Commission by each licensee of any change of principal business location, and that "a change of business location without notification to the Commission and without the issuance by it of a new license shall automatically cancel the license theretofore issued." And that Section Ten provides when any real estate sales-

man shall be discharged or shall terminate his employment with the real estate broker by whom he is employed, it shall be the duty of such real estate broker to immediately deliver or mail by registered mail to the Commission such real estate salesman's license.

It is alleged in the bill that such provisions are arbitrary and unjust and deprive those engaged in the business of their property without due process of law (R. 13, Pr. 9).

(8) That the Act, in Section 14, authorizes the Commission to suspend or revoke any license issued under the provisions of the statute, as follows:

"At any time where the licensee, in performing or attempting to perform any of the acts herein, is deemed to be guilty of:

(a) Making any substantial misrepresentation, or

(b) Making any false promises of a character likely to influence, persuade or induce, or

(c) Pursuing a continued and flagrant course of misrepresentation, or the making of false promises through agents or salesmen, or advertising or otherwise, or * * *

(g) Paying a commission or valuable consideration to any person not licensed, under the provisions of this Act.

(h) Has demonstrated unworthiness or incompetency to act as a real estate broker or salesman in such manner as to safeguard the interests of the public." (R. 14, Pr. 10).

It is objected in the bill that the Act, neither in Sub-Section "a" nor in any other part thereof, specifically designates to what any such "misrepresentation" shall relate and does not prescribe any standard whereby the substantiality or materiality of the representation shall be ascertained which shall be sufficient to suspend or revoke a license (R. 14, Pr. 10).

That Sub-section "b" which refers to the "making of any false promises of a character likely to influence, persuade or induce, is a vague, indefinite and unintelligible provision; and that there is nothing in the statute which indicates to what such promise must relate or to what it must be likely to persuade, influence or induce;" "that it seeks to demonstrate as an offense, the making of a false promise of a character likely to do certain things, regardless of whether or not it shall have such effect," (R. 14, Pr. 10).

That Sub-section "c", with regard to a continued and flagrant course of misrepresentation, "whether it is material or immaterial, is indefinite; and likewise the making of false promises through agents or salesmen or advertising or otherwise, regardless of whether or not they relate to any transaction in the course of the business, or whether they lead or induce any one to act thereon, are made

grounds for the revocation or suspension of the license " (R. 14, Pr. 10).

That Sub-section "g" concerning the paying a commission or valuable consideration to any person not licensed under the provisions of the statute is made a ground for revocation or suspension of the license; "and thus tends to deprive the complainants of their property without due process of law, and the right to pursue their vocation in the ordinary course, because it cannot in any wise affect the public health, safety or morals, or in any wise touch or affect the public, even if the broker or salesman shall seek to procure business through the aid or effort of others and shall pay them for bringing business to him."

That in Sub-section "h" of Section Fourteen, "it is provided that the license may be revoked or suspended if the broker or salesman has demonstrated unworthiness or incompetency to act as a real estate broker or salesman in such manner as to safeguard the interests of the public; that such provision is vague, indefinite and uncertain, and affords no measurement, standard or gauge whereby such incompetency as is mentioned in the Act may be determined; that the effect and consequence of Section Fourteen is to vest in the Commission an arbitrary and unrestrained power, and that therein and thereby the Legislature has delegated to the Commission the legislative power and authority vested in it by the Constitution of the State, and that such delegation is violative of the Constitution of the United States and of the State of Tennes-

see, and deprives complainants of the right to do business, and of their property without due process of law " (R. 15, Pr. 11).

(9) That it is to be inferred from the fact that the Commission shall be composed of persons whose vocation for a period of at least ten years prior to the date of their appointment shall have been that of a real estate broker or real estate salesman, and from the further fact that only a salary of \$600.00 per year was fixed for each of them, it was intended that the commissioners should remain in the business of real estate brokers or real estate salesmen, and the appellees would thereby be subjected to the judgment and determination of their competitors in business (R. 33, Pr. 25).

(10) The Act provides that the application for a license must be accompanied "by the recommendation of at least two citizens, real estate owners, not related to the applicant, who have owned real estate for a period of one year or more in the county in which the applicant resides or has his place of business."

It is alleged that this provision is unreasonable, (R. 38, Pr. 28).

(11) That the Act "Is unreasonable and oppressive and deprives real estate salesmen and these complainants of their right to work in their chosen vocation, by providing that a salesman must have his application 'accompanied by a written statement by the broker whose employ he is to

enter, stating that in his opinion the applicant is honest, truthful and of good reputation, and recommending that the license be granted to the applicant'; and in further providing in Section Nine that the license to a salesman is to be delivered to the broker by whom he is employed, kept in custody and in control of such broker, and in Section Ten of the Act, that if a real estate salesman is discharged or shall terminate his employment with the broker by whom he is employed, it shall have the effect of cancelling his license, and the real estate broker is required by said Act to deliver the license to the Commission; and in making it unlawful, 'for any real estate salesman to perform any of the above acts contemplated by this Act, either directly or indirectly under the authority of said license from and after the date of receiving the said license from said broker by the Commission', even though the salesman does not know of the return of said license; and in providing in Section Eleven 'the revocation of a broker's license shall automatically suspend every real estate salesman's license, granted to any person by virtue of his employment, by the broker, whose license has been revoked, pending a change of employer and the issuance of a new license'; and in Section Twelve thereof in making it unlawful, 'For any real estate salesman to accept consideration for the performance of any of the acts herein specified from any person except his employer, who must be a licensed broker', and also in requiring every salesman to renew his license annually, as well as every time he voluntarily or involuntarily changes employers."

It is charged in the amendment to the bill that "the effect of all these provisions is to reduce the real estate salesman to a condition of servitude and make him but the peon of a real estate broker, depriving him of his liberty and right to labor and contract " (R. 39, Pr. 26).

(12) "The said Act also deprives the said plaintiffs of their liberty and property without due process of law in depriving them of their right to engage in their chosen vocation without paying an annual license fee and annually renewing their license and being each year subject to having a license refused them as provided in Section Eleven of said Act, and in being subjected to said rejection each year without any notice or evidence heard in their presence, because the said Act provides in Section Eleven, 'In the absence of any reason or condition which might warrant the refusal of the granting of a license, the Commission shall issue a new license for each ensuing year upon the receipt of a written request of the applicant and the annual fee therefor, as herein required', and also provides in Section Eight thereof, 'The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for broker's license or salesman's license, or of any of the officers or members of any such applicant, prior to the issuance of any such license'; and neither of said sections nor any part thereof makes provision for any notice or hearing, or other fair

determination upon notice to the applicant." (R. 40, Pr. 26).

(13) This allegation of the amendment repeats the substance of the first allegation of the original bill to the effect that there is a discrimination in favor of corporations (R. 40, Pr. 27).

(14) That the provisions of all the Act taking it as a whole deprive the plaintiffs and all real estate brokers and salesmen of the right to pursue their vocation without the consent and license of three other individuals, and that it reduces to a state of servitude all of the plaintiffs and deprives them of their right to labor, liberty and property, without due process of law " (R. 40, Pr. 27).

As previously suggested, it is worthy of observation that the District Court held unsound all of the specifications contained in the bill of appellees and in the amendment thereto—finding a distinct ground of its own, certain language contained in Section Eight of the Act, which we have already referred to and copied on a previous page of this brief. There is nothing either in the bill or in the amendment which this ground found by the District Court resembles even remotely, except paragraph 4 on page 40 of the record (Pr. 26), which applies the language of Section Eight, relied on by the District Court, not to the original license, but to a renewal that might be desired in some year or years subsequent to the issuance of the original license. The learned counsel who drew

the original bill and the amendment did not doubt at that time, it seems, that a proper hearing was granted by the Act, so far as concerned the original license, but feared only some trouble that might arise in case of a renewal thereafter. The District Court based its holding solely on what it regarded as the want of a provision for a suitable hearing in respect of the original license on application therefor by a real estate broker or real estate salesman.

There is no allegation either in the bill or in the amendment that either of the plaintiffs had applied to the Commission for a license.

There is no allegation that the Commission in the administration of the statute, in respect of persons who had applied for license, had ever been guilty of any harsh, oppressive, or unjust conduct toward them or any of them.

There is no allegation that the statute had ever been construed by the Supreme Court of Tennessee or by any other Court in the state.

There is no allegation of any exigency requiring an immediate taking over of the matter by the national courts, except, in substance, that in case the plaintiffs should not apply for a license, the Commission in publishing the list of persons who had complied with the statute (Sec. 18) would omit plaintiffs' names from such list and thereby advertise the public of the fact that plaintiffs had not qualified under the statute, and also that the District Attorney General might indict them under

Section 20 of the statute and subject them to a fine of not less than \$25.00 nor more than \$100.00, (R. 15-18, Pr. 11-13).

ERRORS ASSIGNED.

The assignments filed in the District Court with the petition for appeal (R. 75, Pr. 54) and specified in the transcript (R. 92, Pr. 66), as those intended to be relied on in this Court, present the propositions immediately following. We have re-arranged them so as to state the points in a more convenient sequence, but refer to the source (in the errors assigned in the District Court) from which each proposition is drawn.

1.

The District Court erred in declaring Chapter 98 of the Public Acts of Tennessee for the year 1921 unconstitutional, and in awarding the injunction embraced in its decree appealed from (R. 94, Pr. 67; R. 75, Pr. 54; R. 56, Pr. 40).

2.

The District Court erred in holding that Section Eight of Chapter 98 fails to accord applicants for license a proper and sufficient hearing of a judicial nature in respect of their right to have issued to them a license under the Act before deciding the question of the right to receive such license (Er. III, R. 95, Pr. 68).

3.

The District Court misconstrued the sentence in Section Eight relied on by that Court ("The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker's or salesman's license, or of any of the officers or members of any such applicant prior to the issuance of any such license"), as ground for holding that the statute failed to accord applicants for license a proper and sufficient hearing of a judicial nature upon the question of the right to receive such license (Er. II-V, R. 95-98, Pr. 67-69).

4.

The District Court should have construed said clause as meaning that the Commission was authorized to require of the applicant, and procure of him through such requirement, such additional evidence as might be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any such applicant, (Er. IV, R. 96, Pr. 68).

5.

The District Court should have construed Section Eight in connection with, or *in pari materia*, with Sections Fourteen and Fifteen, and being so construed, the clear meaning was that the applicant was to have a full hearing upon the question of

his right to receive a license on all the evidence adduced and before the decision of such question by the Commission (Er. V, R. 96-97, Pr. 68-69).

6.

The District Court erred in holding that in order to be valid under the Constitution of the United States and the Fourteenth Amendment thereto, said Chapter 98 particularly referred to in Assignment No. One, must or should on its face and by its own terms grant to applicants for license the right to a judicial hearing of said matter by the Commission itself, or some other body possessed of judicial powers, and that resort cannot be had to other statutes of the State of Tennessee or to the decisions of the Supreme Court of Tennessee, the state's highest court, for the purpose of showing in support of such Act that such right of a judicial hearing is available to applicants for such license in any case in which the Commission shall fail or refuse to grant a license under the Act, even if it be true that no such duty of granting a judicial hearing is imposed on the Commission itself by the terms of the act (Er. VII, R. 98, Pr. 69-70).

7.

The District Court erred in refusing to hold and failing to hold that, in case a license shall be refused by the Commission any applicant therefor, under said Chapter 98 particularly referred to in Assignment No. One, can obtain relief in the courts of the State of Tennessee, if on the merits of the

controversy entitled thereto, by filing a petition in one of the Circuit Courts of the State of Tennessee for a removal of said controversy into the said Circuit Court for a trial thereof and decision thereon, through the agency of the writ of certiorari, grantable in the State of Tennessee in lieu of appeal in cases wherein no appeal is directly provided for by law; or in case the Commission for any reason shall refuse to hear an application, then that such hearing can be compelled by the writ of mandamus under the laws of Tennessee, obtained by filing a sworn petition or bill in either the Circuit or Chancery Court of the State of Tennessee, and that after such hearing by the Commission the case can be transferred into one of the Circuit Courts of the State of Tennessee, under petition for the aforesaid writ of certiorari, for trial of the controversy on the merits thereof (Er. No. VI, R. 98, Pr. 69).

8.

The District Court erred in not holding that the failure of the State of Tennessee in said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, if there was in fact such failure, to make provision in the Act for a hearing of a judicial nature by the Commission itself or by some other body having judicial powers, of the application for license under the Act would not invalidate the Act, it appearing from the face of the Act that it does not deny the applicant the right of access to the courts for determining any matter which would be an appropriate subject of

judicial inquiry, and the Court erred in holding such act unconstitutional, and in granting the temporary injunction referred to in Assignment No. One, notwithstanding no such fact was shown in the bill of complaint or in the record (Er. VIII, R. 99, Pr. 70).

9.

The Court erred in failing and refusing to hold that the words in the Eighth Section of said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, vesting the Commission with the discretionary power to procure "any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant," in addition to such as might be furnished voluntarily by the applicant or be furnished on requirement made of him by the Commission (if such be the true construction of said Section Eight, which appellants do not admit) could be eliminated by the Court and the Act saved; and erred in holding that this discretionary power is so vital and so intertwined with and interwoven into said Section Eight that it could not be cut out for the purpose of saving the Act; the Act having been held by the Court in all other respects constitutional and valid, but for said offending discretionary power; whereas the Court should have held that such offending matter might be stricken out and the Act saved; and should have decreed that the Act was constitutional and valid, and erred in not so holding, and in

granting the temporary injunction (Er. XI, R. 100, Pr. 71).

10.

The said Court erred in granting the temporary injunction on the motion made therefor in the absence of an allegation in the bill or a showing in the record, that it had been made to appear or was true, as a fact, that in the actual administration of the said Chapter 98 of the Public Acts of the State of Tennessee for the year 1921, the Commission had been guilty of an arbitrary or oppressive exercise of the powers conferred on them by the Act in the refusal of license to complainants or either of them, or to one of them or to some other person or applicant (Er. IX, R. 99, Pr. 70).

11.

That the said Court erred in declaring said Chapter 98 unconstitutional, and in granting the temporary injunction referred to in Assignment 1, because it does not appear from the bill of complaint that either of the plaintiffs suffered or would suffer from the objectionable matter found by the Court in Section Eight of the Act, as appearing in its opinion, authorizing the Commission to procure evidence independently of the applicant and to act on same without calling his attention thereto and giving him an opportunity to reply to the same prior to the action of the Commission upon such application; for that it does not appear from the bill of complaint or elsewhere in

the record that either of the plaintiffs has applied for a license under the act, and that if such an application were made, such discretionary power to procure other evidence would be applied to them or either of them, or has ever been applied to any applicant whatsoever, or that a full and satisfactory hearing would not be granted to them without resort to such discretionary power to procure such additional evidence (Er. XII, R. 101, Pr. 71).

BRIEF OF THE ARGUMENT.

1.

The Act of 1919, Chapter 182, was repealed by implication by Chapter 98 of the Acts of 1921.

Poe v. State, 85 Tenn. 495;

Terrell v. State, 86 Tenn. 523;

Inman v. Tucker, 138 Tenn. 512;

Hurt v. Y. & M. V. Co., 140 Tenn. 623.

2.

The license obtained by appellees under the Act of 1919, Chapter 182, was not a contract with the state, therefore, could be revoked by repeal of the statute.

Williams v. Wingo, 107 U. S. 601; 44 L. Ed. 905;

Gray v. State of Connecticut, 159 U. S. 74;
40 L. Ed. 80;

Wheeling & Belmont Bridge Co. v. Wheeling
Bridge Co., 138 U. S. 287, 34 L. Ed. 967.

3.

Chapter 98 of the Public Acts of Tennessee for
the year 1921 was a proper exercise of the police
power of the state.

Riley v. Chambers, 181 Cal. 589; 185 Pac.
855;

Bradley v. Richmond, 227 U. S. 477, 480, 481;
57 L. Ed. 603, 605;

Hall v. Geiger-Jones Co., 242 U. S. 539; 61
L. Ed. 480;

Gundling v. Chicago, 177 U. S. 183; 44 L.
Ed. 725;

Reetz v. Michigan, 188 U. S. 505-6; 47 L. Ed.
563, 565, 566;

Brazee v. People of Michigan, 241 U. S. 340;
60 L. Ed. 1034;

Hutchinson Ice Cream Co. v. State of Iowa,
242 U. S. 153; 61 L. Ed. 217;

La Tourette v. McMaster, 248 U. S. 465; 63
L. Ed. 362;

McCloskey v. Tobin, 252 U. S. 107-108; 64 L. Ed. 481, 482;

Central Lumber Co. v. South Dakota, 226 U. S. 157; 57 L. Ed. 164;

Reinman v. City of Little Rock, 237 U. S. 171; 59 L. Ed. 900;

Hadacheck v. Sebastian, 239 U. S. 394; 60 L. Ed. 348.

4.

In determining whether a business is so far affected with a public interest as to justify regulation, the Court is not confined to the fact of public use, or the absence thereof, but will consider whether its nature and extent is such, as to persons and property or either, and so far affects the public welfare, as to invoke and require governmental regulation.

German Alliance Ins. Co. v. Lewis, 233 U. S. 389; 58 L. Ed. 1011;

Block v. Hirsh, 256 U. S. 135; 65 L. Ed. 865.

5.

The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of a wide scope of discretion in that regard,

and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary; and where a classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed, and one who assails such a law must show that it does not rest upon any reasonable basis, but is essentially arbitrary. What makes for the general welfare, is necessarily, in the first instance, a matter of legislative judgment, and a judicial review of such judgment is limited.

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78-79; 55 L. Ed. 369, 377;

German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 413, 414; 58 L. Ed. 1011, 1022;

Motlow v. State, 125 Tenn. 547, 559;

Nance v. Piano Co., 128 Tenn. 1.

6.

The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative consideration in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short, the legislative discretion within its prescribed limits should be exercised in a particular manner are matters for the judgment of the Legislature.

Chicago B. Q. & R. Co. v. McGuire, 219 U. S. 540, 569; 55 L. Ed. 328, 339;

German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 414; 58 L. Ed. 1011, 1022.

7.

Where, on direct appeal, a question arises as to the constitutionality of a statute, the construction thereof is open for this Court.

Towne v. Eisner, 245 U. S. 418, 426; 62 L. Ed. 372, 376.

8.

Every possible presumption is in favor of the validity of a statute; and the construction must be such as to save the statute if it is reasonably possible to do so.

Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531; 58 L. Ed. 713, 720;

Muggler v. Kansas, 123 U. S. 623, 661; 31 L. Ed. 205, 210;

United States ex rel Atty. Gen'l v. Delaware & H. Co., 213 U. S. 366, 407-408; 53 L. Ed. 836, 849;

Mountain Lumber Co. v. Washington, 243 U. S. 219, 237, 238; 61 L. Ed. 685, 696;

Palmer v. Express Co., 129 Tenn. 116, 158 to 161;

Riggins v. Tyler, 134 Tenn. 581 et seq.

9.

The Court may, in aid of the construction, supply a missing word where it is apparent that a particular word was intended, and it can be inferred from the context or from the manifest purpose of the statute.

R. R. v. Byrne, 119 Tenn. 278, 330-331-332;
Wright v. Cunningham, 115 Tenn. 445;

Riggins v. Tyler, 134 Tenn. 577, 581 et seq.
State v. Crockett, 137 Tenn. 679, 682.

10.

To save a statute the Court will eliminate a part thereof and treat the remainder as good, if when the objectionable part is so eliminated, the balance is valid and capable of being carried out, and if the Court can conclude it would have been enacted if that portion which is illegal had been omitted.

Wileox v. Consolidated Gas Co., 212 U. S. 19, 54; 53 L. Ed. 382, 400;

Berea College v. Kentucky, 211 U. S. 45, 55; 53 L. Ed. 81, 85-86.

Under this rule, even part of a section may be eliminated and the residue saved.

Loeb v. Trustees of Columbia Township, 179
U. S. 472, 490; 45 L. Ed. 280, 290;

Vial v. Penniman, 103 U. S. 714; 26 L. Ed.
602;

Board of Supervisors v. Stanley, 105 U. S.
305; 26 L. Ed. 1044, 1050-1051;

Ohio River & Western Ry. Co. v. Ditty, 232
U. S. 576, 594; 58 L. Ed. 737, 746.

The Tennessee cases are in accord.

Baker v. Miller, 137 Tenn. 55, 62;

Rhinehart v. State, 121 Tenn. 420, 435;

State ex rel v. Willett, 117 Tenn. 334, 349,
350;

State ex rel v. Cummins, 99 Tenn. 667, 682;

Richardson v. Young, 122 Tenn. 471, 523;

State ex rel v. Taylor, 119 Tenn. 229, 256;

Scott v. Nashville Bridge Co., 143 Tenn. 86,
122-123.

11.

It is not essential that the particular statute in question provide for a hearing by the Commis-

sion or some other legal body, as to the right of an applicant to receive a license; it is sufficient if it clearly appear that such right to a hearing is accorded by any other statute or law of the state, or recognized in the decisions of the Court of last resort in the state.

McMillen v. Anderson, 95 U. S. 37; 24 L. Ed. 335-6;

Reetz v. Michigan, 188 U. S. 503, 509; 47 L. Ed. 563, 566-7;

Hagar v. Reclamation District 108, 111 U. S. 701; 28 L. Ed. 572-73;

Palmer v. McMahon, 133 U. S. 660; 33 L. Ed. 772, 776;

Wadley S. R. Co. v. Georgia, 235 U. S. 651, 666, 667; 59 L. Ed. 405, 413, 414;

Dent v. West Virginia, 121 U. S. 114, 32 L. Ed. 623, 626-7;

O'Neil v. Northern Irrigation Co., 242 U. S. 20, 24-27; 61 L. Ed. 123, 128, 129.

In these cases, other statutes of the state are referred to, and in some of them decisions of the Supreme Court of the State, to show that a judicial hearing was available.

In any view, the statute now in question would be construed by this Court in connection with Ar-

ticle "1", Section Eight, of the Constitution of Tennessee, prohibiting the taking of property without due process of law, and the Court will presume that it was not the purpose of the state by the statute to take away property without due process, and would supply the omission of the Legislature by construction if there be need of it, in accordance with the principle laid down in *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 115 U. S. 321, 29 L. Ed. 414, 418, in the following excerpt:

"And if the plaintiffs in error have the constitutional right to such hearing, for which they contend, the statute is properly to be construed so as to recognize and respect it, and not to deny it. The Constitution and the statute will be construed together as one law. This was the principle of construction applied by this court, following the decisions of the state court, in *Neal v. Delaware*, 103 U. S. 370 (Bk. 26 L. Ed. 567), where words denying the right were regarded as stricken out of the State Constitution and statutes, by the controlling language of the Constitution of the United States; and in the case of *Cooper v. The Wandsworth Board of Works*, 14 C. B. N. S. 180, 194, in a case where a hearing was deemed essential, it was said by Willes, J., 'that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature'."

The cases cited by the three judges in their opinion in the District Court (on pp. R. 70, Pr. 51) do not sustain the opposite conclusion. In not one of these cases did there arise the question of any other law of the state on the subject, to supply the omission of the statute in question. Furthermore in *Louisville & Nashville R. Co. v. Central Stock Yards Company*, 212 U. S. 132-144; 53 L. Ed. 441, 446 (cited in the opinion of the three judges), this Court after holding that the law itself (not in any particular statute)—the law itself, as distinguished from the mere discretion of courts, must save the parties' rights, added:

“It follows that the requirement of the State Constitution cannot stand alone under the Fourteenth Amendment, and that the judgment in this respect also having been based upon it must fall. We do not mean, however, that the silence of the Constitution might not be remedied by an act of Legislature, or a regulation of a duly authorized subordinate body, if such legislation should be held consistent with the State Constitution by the state court.”

Id. p. 144; 53 L. Ed. 446.

In *Ohio Valley Water Company v. Ben Avon Borough*, 253 U. S. 288-292; 64 L. Ed. 908, 913-915, also cited by the three judges, this Court did not hold that the particular statute imposing the burden complained of must provide for a hearing; it did not negative our contention that other stat-

utes of the state might be relied on, or decisions of the court of final resort of the state. On the contrary, the Court referred to another statute of Pennsylvania (Sec. 31 of Article 6, Public Service Company Law of Pennsylvania), which counsel suggested granted the right, but because of certain decisions of the Supreme Court of Pennsylvania, cited, which cast a doubt upon the question, the Court declined to determine the point, but at the close of the opinion intimated that on the remand it was open to the Supreme Court of Pennsylvania to construe said Section 31 as granting the right, and in that event, the act imposing the burden might be relieved of the objection that it violated the due process clause of the Fourteenth Amendment.

In the other cases cited by the three judges on the page referred to, while the Court used the expression "the law" must grant the right, as distinguished from the discretion or grace of Courts, the expression "the law" was used in an abstract sense, not for the purpose of confining the term to any particular statute. In one of the cases where the word "statute" is used it was manifestly used in the same sense.

12.

In case the Commission should refuse to grant a license, in any case, the applicant can have the matter reviewed in the Circuit Court of Tennessee and fully heard on the merits on both the facts

and the law on petition for the writ of certiorari. There is a Circuit Court in every county of the state.

Staples v. Brown, 113 Tenn. 639, 642-656;

Lewis v. Shelby County, 116 Tenn. 454, 456-7;

Code of Tennessee (of 1858), Sec. 3124;
Shannon's Code, Sec. 4854; also, see *Infra*,
pp. 62 and 95.

The first cited case cites and quotes the statute and reviews all of the prior decisions, and is the leading case in Tennessee on the subject. In case the applicant for license should believe on good grounds that the Commission is acting illegally or corruptly, the matter can be removed into the Circuit Court by the writ of certiorari even before a decision rendered by the Commission, and there heard on the law and the evidence.

Kendrick v. State, Cook Rpr. 3 Tenn. 474-478;

May v. Campbell, 1 Tenn. (1 Overton) 61, 63, 64;

Beck v. Knabb, 1 Tenn. (1 Overton) 55, 57-61;

Tennessee Code of 1858, Sec. 3123;

Shannon's Code, Sec. 4853.

The cases just referred to are cited in *State v. Hebert*, 127 Tenn. 220, 241, 242, with approval.

In case the Commission should refuse to entertain an application at all, it could be compelled to hear it by the writ of mandamus and to render a decision thereon.

State ex rel v. Taylor, 119 Tenn. 229, 246, 252.

From such decision, if adverse to the applicant, he could prosecute appellate proceedings through the writ of certiorari as in other cases.

Furthermore: The laws of the State of Tennessee accord to appellees the right to test the constitutionality of the Act by an injunction bill filed in the Chancery Court of the State, staying its operation as to them until the question of constitutionality can be settled. A few of the many cases proving the soundness of this proposition are the following:

Nichol v. Nashville, 9 Hump. (28 Tenn.) 252; 257-8;

L. & N. R. Co. v. County Court, 1 Sneed (33 Tenn.) 637; 652-3;

Winston v. Tenn. & Pac. R. R. Co., 1 Baxter (60 Tenn.) 60; 64;

Smith v. Carter, 131 Tenn. 1;

Ferguson v. Tyler, 134 Tenn. 25;

Quinn v. Hester, 135 Tenn. 373; 374;

Berry v. Shelby County, 139 Tenn. 532; 546.

The laws of Tennessee also accord to appellees the right to test the constitutionality of the Act in making their defense to an indictment against them under Section 20 thereof for violating any of the provisions of the Act.

Budd v. State, 3 Hump. (22 Tenn.) 482; 493;

Hatcher and Lee v. State, 12 Lea (80 Tenn.) 368; 371;

Sutton v. State, 96 Tenn. 696;

State v. Del Rio Turnpike Co., 131 Tenn. 600.

13.

The Act is not fatally vague, indefinite and uncertain because it fails to define the word "competent" as used in Section "1", and to define the various terms used in Section Fourteen, Sub-section "a", "c", "d", "e", "f", "g", "h" and "i", exhibiting grounds for removal of the licensee; nor did the Legislature grant legislative power to the Commission, in conferring on its members as a body, authority to judge of and apply the terms referred to, to the facts developed on each application for license or on each proceeding for re-

moval of licensees respectively. Such or similar authority is absolutely essential to the efficiency of governmental commissions and boards, and without the agency of such instrumentalities, governments, both state and national, would be so restricted that they could not adequately serve the ends for which they were established.

Buttfield v. Stranahan, 192 U. S. 470; 48 L. Ed. 525;

Union Bridge Co. v. United States, 204 U. S. 364, 367, 381-389; 51 L. Ed. 523, 527, 531-535;

Standard Oil Co. v. United States, 221 U. S. 1:69-71; 55 L. Ed. 619, 648-9;

Red C. Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 394; 56 L. Ed. 240, 246;

Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 214, 215; 56 L. Ed. 729, 737;

Bradley v. Richmond, 227 U. S. 477, 480, 484; 57 L. Ed. 603-606;

United States v. Atchinson, T. & S. F. R. Co., 234 U. S. 476, 486; 58 L. Ed. 1408, 1422;

Mutual Film Corporation v. Industrial Commission of Ohio, 236 U. S. 230, 245-7; 59 L. Ed. 552, 560;

First National Bank v. Fellows ex rel, 244 U. S. 416, 427; 61 L. Ed. 1233, 1240.

And see New York ex rel v. Van De Carr, 199 U. S. 552; 50 L. Ed. 305.

The Tennessee cases are in accord:

Leeper v. State, 103 Tenn. 500, 523-527;

State ex rel Davis v. Evans, 122 Tenn. 184, 190-93;

Woods v. State, 130 Tenn. 100, 108-119.

Further as to the word "competency." This matter was before the Supreme Court of Wisconsin in the case of Manufacturers & Merchants Inspection Bureau v. Buech, 173 Wis. 433; 181 N. W. 125. In that case, it appeared that the laws of Wisconsin for the year 1919, Chapter 444 provided in Section One that the business of private detective agencies should not be conducted without a license; in Section Two, that any person, partnership or corporation intending to act as a private detective should present to the Secretary of State an application which must be approved by the Fire & Police Commission of cities having such Commission, and by the Chief of Police in other cities; and in Section Three, that the Secretary of State should issue to the applicant a license if he should find

him to be of good character, competency and integrity. It was held that the requirements as to competency, character and integrity furnished a standard for action by the Fire and Police Commission, or municipality in their approval or disapproval of applicants desiring to become private detectives.

On Page 127, the Court said:

“The test and standard of qualification prescribed by the statute for obtaining the license is that the applicant shall be a person of good character, competency and integrity. This standard is not vague and is readily understood as a matter of common knowledge when applied to the subject to which it refers. It is one frequently employed in legislative regulations for licensing vocations, and has been applied in many instances.” 181 N. W. 127.

14.

It is presumed that the members of public commissions, when acting in their official capacity, will discharge their duties honestly and in accordance with the rules of law.

New York ex rel Lieberman v. Van De Carr,
199 U. S. 552, 560; 50 L. Ed. 305, 310;

Plymouth Coal Co. v. Pennsylvania, 232 U.
S. 531, 545; 58 L. Ed. 713, 719.

There is no presumption in advance of the actual exercise of power by the Commission in a given case, that the power will be arbitrarily used; it is only in cases where such arbitrary exercise of power is exhibited that this Court will grant relief.

New York *ex rel* Lieberman v. Van De Carr,
199 U. S. 552, 562; 50 L. Ed. 305, 311.

15.

It was the duty of appellees to make application to the Commission for license in advance of demanding of the Court an injunction on the mere conjecture that injustice might be done them by an unconstitutional exercise of power by the Commission in case they should apply; not having so applied for license, and not having been refused a license, they have no standing in court or right to enjoin the Commission.

Farncomb v. City and County of Denver, 252

U. S. 7, 11, 12; 64 L. Ed. 424, 427.

In the closing paragraph of the opinion, the Court said:

“Plaintiffs in error did not avail themselves of the privilege of a hearing as provided by this section, but after the assessing ordinance had been passed, began this proceeding in the District Court to test the constitutionality of the law. * * * As the plaintiffs in error

had an opportunity to be heard before the board duly constituted by Section 300, they cannot be heard to complain now."

Bradley v. Richmond, 227 U. S. 477, 485-486;
57 L. Ed. 603, 606, 607;

Plymouth Coal Co. v. Pennsylvania, 232 U.
S. 531, 544; 58 L. Ed. 713, 719.

16.

The inconvenience to appellees likely to arise from an application to the Commission for license, and payment, under protest, of the fees prescribed in Section Eleven of the Act (\$10.00 to \$20.00 for original license and \$5.00 for each renewal), and subsequent suit therefor, being so insignificant, the matter was not of sufficient importance as being "clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation" as to justify them in applying for an injunction, arresting the collection of the license fees by the state, and interfering with the governmental machinery of the state.

San Diego Land & Town Co. v. National
City, 174 U. S. 739, 754; 43 L. Ed. 1154,
1160.

17.

The applicant for license having the right under Section Eight of the statute to file his application therefor with its accompanying recommendations and certificates and his own sworn statement pre-

scribed in that section, and it being the duty of the Commission to consider these evidences in disposing of the question of the granting a license, this is a provision for a sufficient hearing (granted by the very terms of the statute itself) to comply with the requirements of the Fourteenth Amendment, without regard to the applicant's right to an additional hearing under other statutes of Tennessee through a petition for writ of certiorari, or other appellate proceedings.

Engel v. O'Malley, 219 U. S. 128, 134-138;
55 L. Ed. 128, 135-6;

Gundling v. Chicago, 177 U. S. 183; 44 L. Ed.
725;

San Diego Land & Town Co. v. National
City, 174 U. S. 739, 752-754; 43 L. Ed. 1154,
1159, 1160.

If it should be deemed essential that the right to subpoena additional witnesses should be granted by the statute (but we insist this would not be essential) then we submit the Court would construe *in pari materia* Secs. 8 and 15 of the statute, as the Court in Engel v. O'Malley, *supra*, construed together Secs. 25 and 26 of the New York statute, the first concerning the granting of a license, the second its revocation.

219 U. S. 137 (*Ibidem*); 55 L. Ed. p. 136.

In any event, inasmuch as the statute does not deny the right of a hearing to the applicant, the Court would presume that such right existed under the laws of the state in some form in some Court thereof.

Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 311; 58 L. Ed. 229, 241-2.

On the page last cited, the Court said, in the case concerning the fixing of rates by a railroad commission:

“If the Commission establishes rates that are so unreasonably low as to be confiscatory, an appropriate mode of obtaining relief is by bill in equity to restrain the enforcement of the order (authorities). Presumably the courts of the state as well as the Federal Courts would be open to the carrier for this purpose, (*Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 278), without express statutory provision to that effect. In answer to the present objection, it is sufficient to say that there is no showing here of an attempt to preclude such resort to the Courts, or to deny to the carrier the assertion of its rights unless it can be found in the severity of the penalties attached to the disobedience of the order. And if it were assumed that these would be open to objection as operating to deprive the carrier of a fair opportunity to contest the va-

lidity of the Commission's action, still the penal provisions would be separable and the force of the remaining portion of the statute would not be impaired."

The distinction, as we conceive, is this: When the state statute in question does not deny a hearing in some form this Court will presume (unless it be otherwise shown that the right to a hearing does not exist under the state's laws) that such right exists under the laws of the state (*Louisville & N. R. Co. v. Garrett*, 231 U. S. 298); but where it affirmatively appears as in *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418; 33 L. Ed. 970, that the decision of the board is conclusive and that no right to a hearing before the board or Commission exists; or where it appears, as in *Ex parte Young*, 209 U. S. 123, 147; 52 L. Ed. 714, 723, 724, that the penalties under the state statute for an unsuccessful resistance are so enormous as to practically forbid any effort at obtaining a hearing at all, this is equivalent to an actual denial of a hearing, and under such states of fact, the logical result is that the party is deprived of a hearing under the laws of the state, and there is a violation of the due process clause of the Fourteenth Amendment.

It is sufficient if the applicant have the right to one fair hearing somewhere along the line either before the Commission or some other legal body having power to grant such hearing.

Reetz v. Michigan, 188 U. S. 505, 507-510;
47 L. Ed. 563, 565-567;

Engel v. O'Malley, 229 U. S. 128, 134, 138; 55
L. Ed. 128, 135-6;

Farncomb v. City and County of Denver, 252
U. S. 7, 12; 64 L. Ed. 424.

Respectfully submitted,

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ARGUMENT.

Assuming that the Court will consider appellees' various specifications of unconstitutionality set forth in the bill and the amendment thereto, and stated *supra* under marginal numbers ("1") to ("14") inclusive, in our Statement of the Case (Ante 1 to 14), although the opinion of the District Court was adverse to these, we shall first address this argument to these points in regular order, under Assignment No. 1.

We shall then take up the remaining assignments (R. 76-82, Pr. 55-59), (R. 94-101, Pr. 67-72), as restated, ante, on pages 15 to 21, which are directed specifically to various aspects of the ground on which the District Court based its decree; that is, the special ground on which the District Court held Section Eight of the statute invalid, arising out of a single sentence in that section. While these latter assignments logically fall under Assignment No. "1", since that assignment is broad enough to cover them all, still we deemed it prudent, and not inappropriate, to make specific assignments as to this matter.

CHAPTER 98 OF THE PUBLIC ACTS OF
TENNESSEE FOR THE YEAR 1921, REGULAT-
ING THE BUSINESS OF REAL ESTATE BROK-
ERS AND REAL ESTATE SALESMEN IN THE
STATE OF TENNESSEE, IS NOT AN UNREA-
SONABLE INTERFERENCE WITH THE RIGHT
OF CITIZENS TO ENGAGE IN A LEGITIMATE
AND USEFUL OCCUPATION.

The right to engage in a business affected with a public interest must be exercised by all persons subject to the police power of the state.

Real estate salesmen and brokers are devoted to a business which is characterized by a distinct public interest. They act in a relationship to the pub-

lie which is distinctly fiduciary and confidential. It is, therefore, not unreasonable to require that such persons should possess a good reputation for honesty and fair-dealing, and should be competent to transact the business which they undertake to perform, and that they should be trustworthy. They should be able to represent their clients intelligently, as well as honestly; therefore, they should be reasonably well informed not only as to the general nature of the business and the subjects that must engage the attention of the broker and salesman in connection therewith, but also as to the details of the business. The real estate broker acts as agent for his client, who is often wholly without business experience, and places himself absolutely under the advice of the broker, depending blindly upon the latter to direct him. Real estate salesmen and brokers should have knowledge of the market value of real estate in the city or district wherein they operate. It falls within the duty of such persons, under the statute (Section 2) also to supervise the making of leases, and hence to look after repairs, to place insurance, and to secure possession of the property for the owner, in case of default, or to advise him in such matters. They should be informed as to the various details connected with the repair of property which they have in charge, so that they will not allow excessive prices for plumbing, carpenter's work, wiring and other repairs. Owners rely upon the real estate man to find a purchaser or tenant for their property, and to advise them as to what the terms, and conditions should be.

That these various qualifications and others are characteristic of an efficient real estate man, is a matter of common knowledge. This may also be inferred, in substance, from the description of the terms real estate broker and real estate salesman, as the same appear in the statute in question.

In the case of *Riley v. Chambers* 181 Calif. 589 (185 Pac. 855), a statute quite similar to the one under examination in this case, was before the Supreme Court of California. The statute there under examination was one regulating the business of real estate brokers and salesmen.

The Court said:

“The test is whether or not the limitation imposed is really by way of regulation only, is one whose purpose and effect go no further than throwing reasonable safeguards in the public interest around the exercise of the right. If the limitation is of this character, its imposition is a proper exercise of the police power resident in the legislature, and whose exercise is one of the latter’s most important functions.

“Now the single primary purpose of the act is to require of real estate brokers and salesmen that they be ‘honest, truthful and of good reputation.’ All of its provisions, including the requirement of a license, are but incidental to this single purpose and designed to accomplish it. In the nature of things no amount of regulation can insure the possession of

those qualities by everyone engaged in the business, and it is easy to conceive of regulations which would have this as their sole object and yet be so extreme as practically to take away the general right of engaging in the business. Two questions, therefore, arise regarding such regulations as those here imposed: First, is the general limitation that only persons of good character may engage in the particular business a safeguard which may reasonably be required as to that business? And, Second, are the specific limitations prescribed to accomplish the general purpose no more than reasonable therefor?

“As to the second question, there is no controversy in the present case, and in fact, there could not well be any. It is clear that if it is permissible to require some assurance of good character, the specific limitation imposed for that purpose by this act that every one seeking to engage in the business shall file a written application accompanied by a certificate of good character, is no more than reasonable.

(1) The controversy is over the first question, whether or not the general limitation that only persons of good character should engage in the business is a permissible one. The position of counsel opposing the validity of the act is that ‘to prevent a person engaging in a lawful and innocuous business or occupation because of his moral character or reputation is in our opinion an arbitrary invasion of private rights and liberties.’ This may be true of some busi-

nesses and vocations. It is certainly not true of all. Where the occupation is one of which it can be fairly said that those pursuing it should have certain particular qualifications, it is within the power of the legislature to exact reasonable assurances of those pursuing the occupation that they do possess those qualifications. The most familiar illustrations of this are the qualifications of preliminary training and learning required of professional men such as lawyers, physicians, dentists, pharmacists and architects. Where the occupation is one wherein those following it act as the agents and representatives of others and in a more or less confidential and fiduciary capacity, it certainly can be fairly said that those pursuing it should have in a particular degree the qualifications of 'honesty, truthfulness and good reputation.' The occupation of a real estate agent is of just this sort. He acts for others and in a more or less confidential and fiduciary capacity. As a result there is particularly required of him for the proper discharge of his duties honesty and truthfulness, and the legislature has the right to require some assurance of their possession by every one following the occupation. One strong assurance of their possession is a good reputation.

"No extended discussion of this point is necessary. It is definitely settled by the Supreme Court of the United States in *Hall v. Geiger-Jones Co.*, 242 U. S. 539. The State of

Ohio had passed a law requiring every dealer in securities, such as a bond issue, to obtain a license from the State Superintendent of Banks. As a condition of obtaining such a license the dealer is required to establish his good repute to the satisfaction of the state official. The same attack was made upon the law by reason of this provision as is now made upon the California law, but its validity was upheld.

“So far as this point is concerned, there is certainly no difference between the occupation of a dealer in securities and that of a real estate agent. In fact, the relation of the latter to his client is of a more fiduciary character than that of the security dealer to his customer.”

In the case of *Hall v. Geiger-Jones Co.*, 242 U. S., 539; 61 L. Ed. 480, above referred to by the California Court, the question arose as to the validity of an act regulating the sale of securities in the State of Ohio.

This Court held that the Fourteenth Amendment did not prevent such regulation; and sustained a statute requiring as a condition precedent to dealing in such securities that the state official should be satisfied with the good reputation of the applicant and its selling agents, with authority to revoke the license or to refuse to renew it upon ascertaining that the licensee had a bad reputation, or had violated the provisions of the act.

Mr. Justice McKenna delivered the opinion of the Court. After reviewing the right of the states to exercise their police power, which he states is "the least limitable of the exercises of government," the Court said:

"Even if the description be regarded as rhetorical, the existence of evil is indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government, and that the appreciation of the consequences of it is not open for our review."

Hall v. Geiger-Jones Co., 242 U. S. 551; 61 L. Ed. 480.

As to the reasonableness of such a regulation, the Court said:

"We have very lately decided a case upon the principle of the power of the state to prevent frauds and impositions. *Hutchinson Ice Cream Co. v. Iowa*, 242 U. S. 153, ante, 217, 37 Sup. Ct. Rep. 28. The principle applies as well to securities as to material products, the provisions of the law necessarily varying with the objects. As to material products the purpose may be accomplished by a requirement of inherent purity. The intangibility of securities, they being representatives or purporting to be representatives of something else, of property, it may be, in distant states and countries, schemes of plausible pretensions, requires a difference of provision,

and the integrity of the securities can only be assured *by the probity of the dealers in them and the information which may be given of them.* This assurance the state has deemed necessary for its welfare to require; *and the requirement is not unreasonable or inappropriate.* It extends to the general market something of the safeguards that are given to trading upon the exchange and stock boards of the country, —safeguards that experience has adopted as advantageous. Inconvenience may be caused and supervision and surveillance, but this must yield to the public welfare; *and against counsel's alarm of consequences, we set the judgment of the state.*" (Italics ours.)

Hall v. Geiger-Jones Co., 242 U. S. 539-552;
61 L. Ed. 480; 490.

This Court has recognized the right of the states to regulate many forms of business other than those above referred to.

Regulation of the practice of medicine.

Reetz v. Michigan, 188 U. S. 505, 507; 47 L.
Ed. 563, 565, 567.

The right to regulate the sale of cigarettes, and to require persons applying for license to sell these articles to possess a good character and reputation, and that the officers entrusted with the power of issuing the license shall, before issuing first be satisfied on these points, and that the applicant is a suit-

able person to be entrusted with the sale of cigarettes, was sustained in the case of : *Gundling v. Chicago*, 177 U. S. 183; 44 L. Ed. 725.

State statutes and municipal ordinances have also been sustained by this Court, regulating the following kinds of business :

Employment agencies.

Brazee v. People of Michigan, 241 U. S. 340; 60 L. Ed. 1034.

Ice cream companies.

Hutchinson Ice Cream Company v. State of Iowa, 242 U. S. 153; 61 L. Ed. 217.

The business of insurance brokers.

La Tourette v. McMaster, 248 U. S. 465; 63 L. Ed. 362.

The business of obtaining adjustment of claims.

McCloskey v. Tobin, 252 U. S. 107, 108; 64 L. Ed. 481, 482.

The business of persons engaged in the production, manufacture, or distribution of any commodity in general use, so far as to prevent discrimination between different sections, communities or cities, of a state, by selling such commodities at a lower rate in one section than in another.

Central Lumber Company v. South Dakota,
226 U. S. 157; 57 L. Ed. 164.

The business of keeping a livery stable.

Reinman v. City of Little Rock, 237 U. S. 171;
59 L. Ed. 900.

The brick-making business.

Hadacheck v. Sebastian, 239 U. S. 394; 60 L.
Ed. 348.

See also the case of Bradley v. Richmond, 227 U. S.), wherein the Court held a statute of the state of Virginia *regulating*, and taxing among other occupations, *real estate agents*, was not a violation of the Fourteenth Amendment.

227 U. S. 477, 480-481; 57 L. Ed. 603, 605.

The general principle on which must be determined the question whether a given business is affected with a public interest is discussed in German Alliance Insurance Company v. Lewis, 233 U. S. 389; 58 L. Ed. 1011. See also Lindsley v. National Carbonic Gas Co. 220 U. S. 61, 78; 55 L. Ed. 369, 377. Block v. Hirsh, 256 U. S. 135; 65 L. Ed. 865.

Thirteen states have passed laws regulating the business of real estate brokers and salesmen. They are as follows: Arizona, Colorado, Idaho, Illinois, Louisiana, Michigan, Montana, New Jersey, Oregon, Tennessee, Utah, Wisconsin and Wyoming.

This fact is persuasive of the existence of a widespread need of legislation of the kind.

THE VARIOUS OBJECTIONS TO THE CONSTITUTIONALITY OF SAID CHAPTER 98 SET FORTH IN THE ORIGINAL BILL AND THE AMENDMENTS THERETO, AND WHICH WE HAVE LISTED IN OUR STATEMENT OF THE CASE AND DISTINGUISHED BY THE MARGINAL NUMBERS (1) to (14) INCLUSIVE, ARE EACH AND ALL INVALID.

As to appellees' Points (1) and (13) to the effect that corporations are exempted from the statute.

It is apparent that the word "corporation" was unintentionally omitted in Section "1" and the mistake of the copyist in enrolling the statute. The other parts of the Act show incontestibly that it was intended that this provision should apply to corporations. This is proven by the following: Note the title to the Act, "to define," etc. Read in that connection Sections Two and Three, Eight, Eleven, Thirteen, Seventeen and Twenty. All of these sections show that the Act regulates all corporations that engage in the business, thus showing that the absence of the word "corporation" in Section "1" was the error of the copyist, or, at most, a slip of the pen, or an unintentional omission.

As to the power of the Court to supply a missing word, see the following cases:

R. R. v. Byrne, 119 Tenn. 278, pp. 330, 331, 332;

Wright v. Cunningham, 115 Tenn. 445;

Riggins v. Tyler, 134 Tenn. 577, 581, et seq.;

State v. Crockett, 137 Tenn. 679, 682.

As to appellees' Point (2).

The statute is not vague because it fails to define the word "competent" in Section One therein. It is prescribed that persons to be licensed shall be such as are competent to transact the business of real estate brokers or real estate salesmen in such manner as to safeguard the interest of the public.

Manufacturers & Merchants Bureau v. Buech
173 Wis. 433 (181 N. W. 125).

The third syllabus of that case reads as follows:

The law of 1919, Chapter 444, provides in Section One: "That the business of a private detective, as aforesaid, shall not be conducted without a license; that any person, partnership or corporation intending to act as a private detective shall present to the Secretary of State an application which must be approved by the Fire & Police Commission of his city, having such a commission, and by the Chief of Police in other cities, etc.; and in Section Three, that the Secretary of State shall issue to the applicant a license; if he shall so find him to be of good character, competency and integrity, etc;

the requirements as to competency, truth and integrity furnish a standard for action by the Fire & Police Commission or municipality in their approval or disapproval of applicants desiring to become private detectives."

In the opinion the Court says:

"The test and standard of qualifications prescribed by the statute for obtaining the license, is that the applicant shall be a person of good character, competency and integrity. This standard is not vague, and is readily understood as a matter of common knowledge when applied to the subject to which it refers. It is one frequently employed in legislative regulations for licensing vocations, and has been applied in many instances in the legislation of this and many other states."

Id. 181 N. W. 127.

And see: *Gundling v. Chicago*, 177 U. S. 183; 44 L. Ed. 725.

Union Bridge Co. v. United States, 204 U. S. 364, 379-388; 51 L. Ed. 530-534.

The definition of the word "competent" as appears in Webster's New International Dictionary is:

"Answering to all requirements; adequate; sufficient; capable; qualified; suitable; fit."

It is to be noted that Section Four of the statute requires the Governor to appoint as members of the Commission, five persons whose vocation for a period of at least 10 years prior to the date of their appointment, shall have been that of a real estate broker or real estate salesman.

It must be presumed that such persons know from experience and observation what qualifications are needed to make one a competent real estate broker or salesman, and would apply this experience in weighing evidence offered.

Mutual Film Corp. v. Industrial Commission,
236 U. S. 280, 245-247; 59 L. Ed. 552, 560.

Chicago, B. & Q. R. Co. v. Babcock, 204 U. S.
585, 598; 51 L. Ed. 636, 640-641.

It must be presumed also that they would act honestly and fairly and be governed in their judgment by sound and honest considerations and act generally as experts in the business. If a question of the kind were to come before a Court, it would have to rely upon the opinion of persons acquainted with the business. Furthermore, Section One says, "competent to transact the business," etc., "in such manner as to safeguard the interests of the public, and only after satisfactory proof thereof has been presented to the Commission." In view of this, the Commission will hear any evidence offered as to the competency of applicants and if the members of the Commission are honest, there will be small danger of error. See also in this connection Section Eight

of the statute, which provides that all applications for license shall be in writing to the Commission; that such applications shall also be accompanied by recommendations from at least two citizens, real estate owners, not related to the applicant, who have owned real estate for a period of one year or more in the county in which the applicant resides, or has his place of business, which recommendations shall certify that the applicant bears a good reputation for honesty, competency; and fair-dealing; and recommending that the license be granted to the applicant. This section also provides that the applicant shall set forth by a sworn statement other data which will enable the Commission to reach a correct judgment; among other things, the place where he has carried on business, and the length of time in which he has been so engaged. In the same section similar information is required as to applicants for license as real estate salesmen.

Such matters are properly determinable in Tennessee by a Board or Commission appointed for the purpose.

Leeper v. State, 103 Tenn. 500, 523-526;

State ex rel Davis v. Evans, 122 Tenn. 184, 190-193;

Woods v. State, 130 Tenn. 100, 108 to 119.

The same is true under the decisions of this Court.

See cases cited under the proposition No. 13, p. 35 and 36, "Brief of the Argument."

As to appellees' Point (3).

The statute does not fail to require the Commission to issue a license when the applicant shall have complied with the provisions of Section Eight.

Section One of the statute says:

"That brokers, etc., shall not do business without first obtaining license under the provisions of this Act."

The next sentence says:

"A license shall be granted," etc. Section Four provides for the appointment of the Commission, and that this Commission "shall organize by selecting a president, and may do all things necessary and convenient for carrying into effect the provisions of this Act, and may from time to time promulgate necessary rules and regulations. Section Five provides that "the Commission shall employ a secretary, clerks and assistants, obtaining an office, furniture, stationery, fuel, lights and such other conveniences as shall be reasonably necessary for the carrying out of the provisions of this act." Section Six provides that the Commission shall adopt a seal and use it in issuing authenticated copies of its proceedings; and it shall keep its records in its office, open to public inspection. Section Nine imposes the duty of issuing licenses. The first sentence reads that: "The Commission shall issue to each licensee a license, in such form and size as shall be prescribed by the Commission." Then follows a description of

the license. Section Ten provides for the redelivery of the license to the Commission, and the issuance of a new license. Section Eleven provides for the cost of the license. Section Fourteen provides for the suspension and revocation of licenses. Section Eighteen provides for the publication of the names of licensees. In view of the contents of all these sections, there can be no possible doubt as to the duty of the Commission to issue licenses.

As to appellees' Point (4).

It is true that the statute does not in terms provide for any regular or fixed meeting of the Commission; but it is to be noted that Sections Four, Five and Six provide for a complete organization and for an office and place where the business of the Commission shall be carried on, and where its records shall be kept and copies issued, and where its records shall be open to public inspection. Section Eight provides for applications for licenses, and Section Nine their issuance. All of this implies that the office shall be kept open all the time. The law presumes that the members of the Commission will discharge their duties and will promptly hear every application for license and act on it.

Plymouth Coal Company v. Pennsylvania,
232 U. S. 531, 545; 58 L. Ed. 713, 719.

The applicant by filing his petition with the board in accordance with Section Eight of the statute, in-

stitutes a proceeding before it to obtain a license. There can be no doubt that he would have the right under the statute to follow it up, and to present the "satisfactory proof" called for in Section One, and in Section Eight.

In Section Fifteen it is provided:

"The Commission shall have the power to subpoena and bring before it any person in the state, or take testimony of any such person by deposition, with the same fees and mileage in the same manner as prescribed by law in judicial procedure in the courts of this state in civil cases."

It is true this sentence occurs in the section devoted especially to the matter of suspending or revoking licenses, but it fixes the point that the legislature regarded the Commission as a board or tribunal created by that body with power to issue subpoenas for witnesses and to grant hearings. It is further to be noted as above suggested that in Section One it is provided that a license shall be granted "only after satisfactory proof" of competency, honesty and fair-dealing shall have been presented to the Commission, and that in Section Eight the Commission is vested with authority to "require and procure" any and all satisfactory proof. The only means by which such satisfactory proof could be procured would be through the issuance of a subpoena for witnesses, whose names are furnished by the applicant, or a requirement of the applicant to furnish additional affidavits or to produce addi-

tional witnesses. It cannot be doubted, taking all these sections together, that the legislature regarded itself as creating a board with power to conduct hearings in exercising the duties committed to its charge and as an aid thereto to compel the attendance of witnesses through a subpoena. It is true there is no provision for a rehearing of the matter after the Commission shall have refused to issue a license; nor is there anything in the Act forbidding the Commission to grant a rehearing, or the issuing of subpoenas for witnesses on such rehearings. We submit it is not essential that the Act should provide for a rehearing before the Commission.

Pittsburgh C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 426; 38 L. Ed. 1031, 1036.

It is not essential to the constitution of such Board that it shall have all the powers of an ordinary Court of judicature.

Reetz v. Mich., 188, U. S. 505; 47 L. Ed. 565.

Furthermore the decisions of such a board in respect of refusing a license would be subject to re-examination in the Circuit Courts of Tennessee, under the writ of certiorari which is allowed in lieu of appeal where the statute provides for no appeal.

“Certiorari lies: (1) On suggestion of diminution; (2) where no appeal is given; (3) as a substitute for appeal; (4) instead of audita querela; (5) instead of writ of error.”

Shannon's Code of Tenn. Sec. 4854;

Tennessee Code 1858, Sec. 3124;

Staples v. Brown, 113 Tenn. 639, 642, 643, 647;

Lewis v. Shelby Co., 116 Tenn. 454, 456, 457;

Brief of Argument, ante, pp. 31-34.

As to appellees' Point (5).

The statute by excepting persons holding a duly executed power-of-attorney does not deny appellees the equal protection of the laws. The classification in Section Two of the statute making a distinction between real estate brokers and real estate salesmen on the one hand, and "persons holding a duly executed power-of-attorney from the owner for the sale, leasing or exchanging of real estate," on the other hand, has a reasonable basis.

The first classification in Section Two embraces real estate brokers and real estate salesmen, and designates them as the persons who do the things set forth in the first and second sentences in Section Two, "as a whole or partial vocation." The second classification in the section is expressed in the first part of the third sentence and comprises all owners who act for themselves. The third classification is embraced in the same sentence last re-

ferred to and applies "to persons holding a duly executed power-of-attorney from the owner for the sale, leasing or exchange of real estate." The fourth classification follows, and covers the case of attorneys at law who perform their duties as such. The remaining classifications cover receivers, trustees in bankruptcy, administrators, executors and persons selling real estate under order of any court, and trustees selling under deeds of trust.

The members of the class represented by the language contained in the third classification noted above do not stand in the same class with "real estate brokers" and "real estate salesmen," described in the first and second sentences of Section Two, which real estate brokers and salesmen do the things therein mentioned "as a whole or partial vocation." This feature is absent from the class described as "persons holding a duly executed power-of-attorney from the owner for the sale, leasing or exchange of real estate." Not only is the class-mark of "whole or partial vocation" absent, but also that of consideration applicable to real estate brokers and salesmen; and not only this but also the feature of engaging in the business of buying or offering to buy or negotiate the purchase of real estate. The person holding a duly executed power-of-attorney from the owner, has under that power of attorney, as described in the section referred to, authority to deal only with real estate already owned by his principal and only for the purpose of selling, leasing or exchanging that real estate. He has no power to buy or offer to buy or negotiate for the purchase of any real estate for his

principal. Again: the license of a real estate broker or salesman authorizes him to deal for others in any real estate whatsoever as to which he may be able to work up a trade, or negotiate a sale or purchase or lease, while the person holding a duly executed power-of-attorney from the owner of real estate can act only with regard to the real estate therein described, and only for the purpose of selling, leasing or exchanging.

Again another distinction is that the "real estate broker" defined in the first sentence of Section Two is a *broker* and the real estate salesman described in the second sentence of Section Two is an *agent* of the broker and so, in that sense, a broker himself, subject only to the approval of the broker; while the person acting under a duly executed power-of-attorney from the owner for the sale, leasing or exchange of real estate belonging to such owner, is in no sense a broker but a mere special agent with very limited authority; that is, the power to make sales, leases and exchanges of the owner's real estate and to close such transactions.

The power to make an effective sale of real estate or the lease or exchange thereof (as distinguished from a mere contract to sell, lease or exchange, subject to the owner's ratification), implies the power to execute deeds and other writings necessary in law to consummate the transaction. The importance of such provision, especially in cases of large land owners in Tennessee, can be readily perceived and understood when construed in the light of the fact that in the eastern part of the State,

in the mountainous regions, there have long been large holdings of real estate by foreign owners as well as resident owners, some of these embracing thousands of acres of timber, coal and iron lands. It is necessary in some instances and generally most convenient, that these owners, especially non-residents, deal through private agents, duly constituted and instructed by a power-of-attorney, who can find purchasers, to sell the lands and make deeds to them. These powers-of-attorney become links in the chain of title, and must be recorded along with the deed, which the attorney in fact thereunder makes to the purchaser in the name of his principal, the owner. It is also a matter of urgent necessity in the case of foreign owners that such agent have power to make leases of the land in order to keep off trespassers, by having a representative of, or claimant under the owner, always in possession, to prevent the starting of adverse possession on the premises. Many tracts of land have been lost by owners, through adverse possession, for want of this precaution, as the published opinions of the Tennessee Supreme Court in many ejectment cases amply show. The necessity of having a duly constituted agent on hand for the purpose of making exchanges would arise less frequently, but might arise occasionally. All these considerations, though less poignantly applicable to resident owners, would apply to them also, especially in the case of lands or city lots, located in a distant part of the state, or even in a case of the ownership of large tracts nearer the home of the owner.

The opinion of the three judges in the case now before the Court dealt with this matter on page 63 of the transcript, Pr. 49.

As to appellees' Point (6).

Objection that Section Three of the statute provides that one act for a compensation or valuable consideration of buying or selling real estate of or for another, etc., shall constitute the person, etc., a real estate broker or real estate salesman, within the meaning of the statute, and that the Constitution of the United States and the State of Tennessee is thereby violated, because it is asserted, the legislature cannot make the doing of any one act the equivalent of engaging in business, by such statute.

There is no provision of either the Federal or State Constitution that has any bearing on this subject. There is in Tennessee one case which holds that, in general, one act will not subject a person to a privilege tax for carrying on a particular business declared a privilege by the legislature. This case is *Trentham v. Moore*, 111 Tenn. 346, 351 et seq. In a later case this rule was confined to tax statutes and held not to apply to statutes passed under the police power.

McCampbell v. State. 116 Tenn. 98, 107-109.

As to appellees' Point (7).

The provisions of Section Nine of the statute are not arbitrary and unjust, and do not deprive those who engage in the business of their property without due process of law, because that section requires that a notice in writing shall be given to the Commission by each licensee of any change of principal business location, indicating that a change of business location without notification to the Commission and without the issuance by it of a new license, shall automatically cancel the license theretofore issued, and because Section Ten provides that when a real estate salesman shall be discharged or shall terminate his employment with the real estate broker by whom he is employed, it shall be the duty of such real estate broker to immediately deliver or mail by registered mail to the Commission such real estate salesman's license.

Section Nine further provides that "the license of a real estate salesman shall be delivered or mailed to the real estate broker by whom such real estate salesman is employed, and shall be kept in the custody and control of such broker." Again: "Notice in writing shall be given to the Commission by each licensee of any change of principal business location, *whereupon the Commission shall issue a new license for the unexpired period without charge.*" "A change of business location, without notification to the Commission, *and without the issuance by it of a new license, shall automatically cancel the license theretofore issued.*"

It thus appears that it is within the power of the real estate broker to prevent the automatic cancellation of his license at any time by notifying the Commission of his new location, whereupon it becomes the duty of the Commission to issue a new license to him *without charge*. There is nothing unreasonable, harsh or arbitrary about this. It is necessary for the Commission to keep track of the names and addresses of the brokers and salesmen in order that it may comply with the provision of Section 18 as to the publication of the semi-annual list therein provided for, also for identification. It cannot keep track of the business and exercise the supervision required by Sec. 14, without this information at hand, to say nothing of the danger of duplication of names, as in case of persons by the name of Smith, Brown, Jones, and other names of most frequent occurrence. The provision as to location notice, or change of name, not only enables the Commission to do justice in its administration of the statute, but also will prevent it from doing injustice by wrongfully charging one person with the error of another, and also enables them to more easily stop interlopers who have no license.

As to the real estate salesman. The provisions as to him in Section 10 are also reasonable. Under Section 9 his license is to be kept by the broker who employs him. It is manifestly right that when he leaves the employment of the broker, the latter should return the license and notify the salesman that he has done so, and that upon this being done the right of the salesman to act as such shall cease. In no other way can track of the salesmen be kept

and the duties of the Commission be performed under Sections 18 and 14. This does not prevent the salesman from getting a new license on his forming a new connection with another broker, and forwarding his pocket card to the Commission. See Section 10, next to last sentence. For a description of the purpose of the pocket card see last sentence in Section Nine.

As to appellees' Point (8).

Revocation of the license under Section Fourteen of the statute does not deprive brokers and salesmen of property rights without due process of law. An analysis of the grounds of revocation stated in Section Fourteen shows that all of them cover delinquencies which would be injurious to the public or persons dealing through the agent guilty of the misconduct indicated.

It is entirely proper to vest such powers in a Commission. Action by such a body is the only practicable method by which such a matter could be conveniently handled.

There can be no legislative definition of delinquencies of the kind referred to which can automatically attach to the facts which may characterize the conduct of brokers and salesmen in the performance of their various duties, in serving their clients.

As to the usefulness of commissions in matters of this kind and the frequency with which they are employed as agencies of government, we refer to the extensive discussion of the matter in the case of *Union Bridge Company v. U. S.*, 204 U. S. 364; 51 L. Ed. 523; and see ante, pp. 35 and 36.

What was said by this Court in *Hall v. Geiger-Jones Company* as to the ascertainment of reputation and character is, by analogy applicable here:

The Court said:

"Besides it is certainly apparent that, if the conditions are within the power of the state to impose, they can only be ascertained by an executive officer. Reputation and character are quite intangible attributes, but there can be no legislative definition of them that can automatically attach to or identify individuals possessing them, and necessarily the aid of some executive agency must be invoked. The contention of appellees would take from government one of its most essential instrumentalities, of which the various national and state commissions are instances. But the contention may be answered by authority. In *Gundling v. Chicago*, 177 U. S. 183; 44 L. Ed. 725, 20 Sup. Ct., Rep. 633, an ordinance of the City of Chicago was passed on which required a license of dealers in cigarettes and, as a condition of the license, that the applicant, if a single individual, all of the members of the firm, if a co-partnership, and any person or persons in

charge of the business, if a corporation, should be of good character and reputation, and the duty was delegated to the mayor of the city to determine the existence of the conditions. The ordinance was sustained. To this case may be added *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 394; 56 L. Ed. 240, 245, 32 Sup. Ct. Rep. 152, and cases cited."—Citing other cases.

Hall v. Geiger-Jones Co., 242 U. S. 539-553-4; 61 L. Ed. 480, 490-1.

Taking up the various subdivisions, we call the Court's attention to them from the standpoint of their application and reasonableness.

Subdivision (a) under Sec. 14 is "making any substantial misrepresentation."

Webster's New International Dictionary defines "misrepresentation" thus:

"Untrue, improper, or unfaithful representations; especially false or incorrect statements or accounts, usually unfavorable; as a misrepresentation of a person's motives. In popular use this word often conveys the idea of intentional untruth."

The same authority defines the word "substantial" as follows:

"That is of moment; important, essential; material."

Section 4 of the Act makes it the duty of the Governor to appoint as members of the Commission, three men of ten years' experience in the business. It must be presumed that they will be capable and honest men. In the minds of such men there can be little room for difference of opinion as to what constitutes a substantial misrepresentation in a deal of the kind described in Section 2 of the Act.

The Legislature, in imposing duties, by statutory enactments on its officers, must use language, and that language may be clear and distinct, or it may be more or less vague, and so need construction in a greater or less degree by the officer, and consequently by the courts. Experience has shown that owing to the nature of language and the varied senses in which words may be used, as related to different situations, it is practically impossible to so frame a statute as that need for construction of its terms will not appear in course of time. The Statute of Frauds, passed in England during the 29th year of Charles II, and subsequently re-enacted in nearly all of the states of the American Union, is a brief statute and apparently simple in its terms, but the courts have delivered hundreds, perhaps thousands of opinions, construing its terms, and many text books have been developed out of these. The same is true in a less degree of all statutes, but so far as we know, it has never been determined that the possibility of a difference of opinion as to the meaning of a statute, and hence the probability of a need of construction by the officer, or the people who have to act upon it, or by the courts, and the possibility of error somewhere,

in the course of the life of the statute, justify the conclusion that the Legislature devolved its own powers on the officer, the people, or the courts. We submit that such a conclusion is wholly untenable.

Gundling v. Chicago, 177 U. S. 183; 44 L. Ed. 725;

Leeper v. State, 103 Tenn. 500, 523-527;

State ex rel v. Evans, 122 Tenn. 184, 190-193;

Woods v. State, 130 Tenn. 100, 108-119.

And see cases cited ante, pp. 35 and 36.

As to (b) "Making any false promise of a character likely to influence, persuade or induce."

Surely there is little room, if any, for doubt as to the meaning of the expression, "Making any false promise of a character likely to influence, persuade or induce," nor can there be any doubt that the statute means an influence, persuasion or inducement in respect of the business in hand. As to what is a "false promise" there can be no mistake. As to whether in a given instance it is "of a character likely to influence, persuade or induce," a person to enter into some contract of the kind referred to in the first and second sentence of Section 2 of the statute, there may be a difference of opinion, but something must be left to the judgment of the officer or board in applying the Act

as to whether a given state of facts falls under it. It is impossible for the Legislature to foresee all the cases that may arise under a statute, and provide for them. All that it can do in a statute is to lay down general rules of conduct and leave the construction of these rules to those who have to act on them, and to the courts in case anyone chooses to resort to the courts. For any error the Commission could be corrected under the writ of certiorari. Section 15 of the statute.

As to Sub-section (c) under Section 14, "Pursuing a continued and flagrant course of misrepresentation, or the making of false promises through agents or salesmen, or advertising, or otherwise."

What has just been said as to (a) and (b) applies to this also. There is little room for error in deciding what is a misrepresentation or a false promise. There may be a difference of opinion as to whether a particular course of conduct has attained the bad eminence of being "flagrant;" that is, a course of conduct flaming into notice, "notorious, enormous, heinous, glaringly wicked," but here again the decision of a particular case must be left to the officer or board, subject to correction by the courts. It would be impossible for the Legislature to do more than establish the rule.

The fault which the bill finds with this is, that this provision means that it must be understood as "regardless of whether or not it relates to any transaction in the course of the business, or whether it leads or induces anyone to act thereon."

As to the first point that the provision is "regardless of whether or not it relates to any transaction in the course of the business," it would be enough to say that no court would convict any Legislature of such folly, but as a matter of fact the Act (Sec. 14) confines the operation of its specifications (a), (b), (c), etc., to cases "where the licensee, in performing or attempting to perform *any of the acts mentioned herein*, is deemed guilty of"—the wrong-doings specified under (a), (b), (c), etc., in Sec. 14. We submit that the expression "in performing or attempting to perform *any of the acts mentioned herein*," means those acts of the business mentioned in Sec. 2, first and second sentence, that of buying, offering to buy, negotiating the purchase or sale or exchange of real estate, or leasing or offering to lease, or renting or offering to rent, any real estate, or the improvements thereon for others.

As to the second point complained of in the bill on this subject, that revocation of a license may be made "regardless of whether they (the offenses specified in (c) in Sec. 14) lead or induce anyone to act thereon." That is, the proposition in the bill is, in substance, that although a real estate broker or salesman, who in the transaction of his business as such, has been guilty of "pursuing a continued and flagrant course of misrepresentation, or the making of false promises, through agents or salesmen, or advertising, or otherwise," his license cannot, in harmony with the federal and state constitutions, be revoked under an act of the Legislature, unless it appear that some one has

been induced to act thereon. No section or clause of the federal or state constitution is indicated in the bill to support the proposition.

If a real estate broker or salesman be guilty of such disreputable practices as are stated in Sec. 14 (c) it cannot be true that such a person should be permitted to continue in the business for want of proof that he had been able to actually deceive anyone thereby. The offense consists in the unworthy and disgraceful course of life, which casts a reproach on the business, tends to impair public confidence therein, and which at any moment may result in financial loss, and ruin, to some person who may deal with and rely on such irresponsible and disreputable person.

As to (g), "Paying a commission or valuable consideration to any person not licensed under the provisions of this Act." The bill objects that the forbidding of such conduct has no tendency to "in any wise affect the public," meaning that forbidding such conduct does not fall within the police power of the state, because such forbiddance has no tendency to uphold the policy of the Act.

This is manifestly an erroneous view. If such conduct as that described in (g) be tolerated or allowed, it will be tantamount to permitting outside parties, who have no license, to carry on the business, and the efficacy of the Act would be greatly impaired, if not practically destroyed.

As to (h), "Has demonstrated unworthiness or incompetency to act as a real estate broker or

salesman in such manner as to safeguard the interest of the public."

The objection made in the bill as to this provision is "that such provision is vague, indefinite, and uncertain, and affords no measurement, standard or gauge whereby such incompetency as is mentioned in the Act may be determined." For answer to this point see our comment *supra* on (a) of Sec. 14. Ante p. 72.

Now as to the complaint that the effect and consequence of Sec. 14 is to vest in the Commission an arbitrary and unrestrained power, and that thereunder and thereby the Legislature has delegated to the Commission the legislative power and authority vested in it by the Constitution of the state, and that such delegation is a violation of the Constitution of the United States and the State of Tennessee, and deprives complainants of the right to do business and their property without due process of law." See Ante, pp. 35 and 36, Proposition No. 13, cases cited.

What we have already said is sufficient to show that no arbitrary power is vested in the Commission and no legislative power, but additional authorities are cited *infra*.

As to due process of law, Sec. 15 provides for notice and a regular hearing, with power to subpoena witnesses and render a decision, also for a right of appeal to the Supreme Court.

Iowa Central R. Co. v. State of Iowa, 160
U. S. 389; 40 L. Ed. 467;

L. & N. R. R. Co. v. Schmidt, 177 U. S. 230;
44 L. Ed. 747, 750;

Kennard v. Louisiana, 92 U. S. 480; 23 L.
Ed. 478.

The findings of fact, in case of suspension or revocation of a license, in the absence of fraud, are made conclusive, but the Act confers upon the Supreme Court the power to review the questions of law involved in the final decision and determination of the Commission. Such a statute has been held constitutional by the Supreme Court of Tennessee.

McElwee v. McElwee, 97 Tenn. 649;

Anderson Co. v. Hays, 99 Tenn. 542, 565-566.

It is not a violation of the due process of law clause of the Constitution that the finding of the Commission is made conclusive of the facts.

Long Island Water Supply Co. v. Brooklyn,
166 U. S. 685, 695; 41 L. Ed. 1165, 1168.

A review by the Supreme Court of Tennessee may be had under the terms of the statute (Sec. 15) by applying within 30 days after the decision, by certiorari, mandamus, or any other method per-

missible under the rule and practice of the Supreme Court, "or the laws of this state," which would include appeal, writs of error, or any other form of review.

However, a right of review is not essential to due process; the Commission may be vested with the power of final decision both of law and facts where there is a right of a hearing before that body.

Reetz v. Michigan, 188 U. S. 505; 47 L. Ed. 563.

There is no delegation of legislative power in conferring the authority above mentioned upon the Commissioners, in violation of the Constitution of Tennessee.

Leeper v. State, 103 Tenn. 500, 523-527;

Samuelson v. State, 116 Tenn. 470, 486-7;

State ex rel Davis v. Evans, 122 Tenn. 184, 190-193;

Woods v. State, 130 Tenn. 100, 108-119.

The following decisions of this Court fully support the Tennessee cases above cited: See cases cited Ante, pp. 35 and 36.

As to appellees' Point (9).

There is nothing in the statute on the subject, nor any basis therein for the inference stated in the objection; but even though it may be inferred as claimed that the members of the Commission will still pursue the avocation they were engaged in when they were appointed by the Governor of the state, such rivalry as appellees would suffer from these three men (only one, as the statute, Sec. 4, requires, located in each grand division of the state; East Tennessee, West Tennessee and Middle Tennessee), must be considered infinitesimal. The objection is postulated on the assumption that no man engaged in a given business will welcome another into that business, or can be trusted to pass fairly upon his qualifications for entry into the business for fear the newcomer may prosper therein, and so in some remote way become a rival. The mere statement of the contention shows its unsoundness. We shall not argue the point, but we may be permitted to suggest that medical boards are composed of physicians, pharmaceutical boards, of pharmacists, boards of law examiners, of lawyers, and so on and on. No one ever before heard it suggested that professional persons should abandon each his professional business as physician, pharmacist or lawyer before accepting an appointment on a board of the kind referred to; nor have we ever heard of a statute that made such a requirement concerning the selection of an administrative board.

As to appellees' Point (10).

This is of the same insubstantial nature as the Ninth.

It is not unreasonable that the applicant should be required to submit with his application a "recommendation" of the kind complained of pursuant to Sec. 8 of the statute.

If the applicant be of good repute at home, it should not be difficult, in a state so thickly settled as Tennessee, for him to find two land-owners somewhere in his county, who have owned land for one year or more, and who will be willing to recommend him as a person who "bears a good reputation for honesty, competency and fair-dealing," and as one to whom a license should be granted. The only danger is that such certificates will be obtained but too easily, in view of the proverbial readiness with which signatures to petitions for appointments to public office and other supposed governmental favors are obtained.

As to appellees' Point (11).

The statute is not "unreasonable and oppressive," as to real estate salesmen, because of the several matters embraced in appellees' said Point (11).

(a) It is not unreasonable to require of a salesman that his application shall be accompanied "by a written statement of the broker whose employ he is to enter, stating that, in his opinion, the applicant is honest, truthful, and of good reputation, and recommending that the license be granted to the applicant (Sec. 8).

Sec. 2 defines the salesman thus:

"A real estate salesman within the meaning of this act, is any person who, for a compensation or valuable consideration, *is employed either* directly or indirectly by a licensed real estate broker," to sell, etc.

It ought not to be difficult for the salesman to obtain such a certificate from the broker under whom he expects to serve.

There is no difference between the powers of a salesman under the statute and those of a broker except that the former is one who consents to serve under the latter as his agent instead of setting up for himself in the business of a real estate broker. Within the definition contained in Sec. 2, each has power "to sell or offer to sell, or buy or offer to buy or negotiate the purchase or sale, or exchange of real estate, or lease or offer to lease, rent or offer to rent any real estate for others, as a whole or partial vocation"—save that the salesman does these things as agent of the broker of whose entourage he consents to become a part.

(b) Having thus consented to become a subordinate in the establishment of a broker, there is nothing unreasonable or oppressive in the requirement of Sec. 9 "that the license of each real estate salesman shall be delivered or mailed to the real estate broker by whom such real estate salesman is employed, and shall be kept in the custody and control of such broker. This requirement is important, in view of the provisions of Sec. 10, to enable the broker to comply therewith. However, the salesman is not left without evidence of his right to operate under the law. The last sentence in Sec. 9 provides for the delivery to him of a pocket card, which card "shall certify that the person whose name appears thereon, is a licensed real estate salesman, or real estate broker, as the case may be," etc.

(c) The provision of Sec. 10 is not unreasonable or oppressive, "that when any real estate salesman is discharged or shall terminate his employment with the real estate broker by whom he is employed, it shall be the duty of such real estate broker to immediately deliver or mail by registered mail to the Commission such real estate salesman's license." Necessarily the real estate salesman's license must show the name of the broker under whose employment he serves. If the broker did not have possession of the salesman's license, it would be within the power of the latter to seriously involve the broker by acting as his agent after his discharge from the employment, or the termination of that employment in any other manner. Being in possession of the salesman's

license at the time the salesman is discharged or severs his employment, it is within the power, and under Sec. 10, becomes the duty of the broker, as just stated, to return the salesman's license to the Commission.

The salesman is not left without knowledge of the return of his license, as incorrectly suggested in the bill. On the contrary, Sec. 10 provides that the real estate broker shall at the time of the mailing of the salesman's license to the Commission, "address a communication to the last known residence address of such real estate salesman, which communication shall advise such real estate salesman that his license has been delivered or mailed to the Commission. A copy of such communication to the real estate salesman shall accompany the license when mailed or delivered to the Commission."

(d) The provision of Sec. 10 is not unreasonable to the effect that "it shall be unlawful for any real estate salesman to perform any of the above acts contemplated by this Act, either directly or indirectly, under the authority of said license from and after the date of the receipt of said license from said broker by the Commission.

Since the salesman has consented to serve as agent of the broker, and to accept a license based on that condition, and since he must know when he has voluntarily left the employ of the broker, or has been discharged by the latter, it is nothing more than right that he should thereafter cease to

function under the license previously issued to him, or under the pocket card described in Sec. 9.

There is nothing to prevent the salesman there-after obtaining a new license to act under some other broker pursuant to the provisions of Sec. 8, as in the first instance, the only condition attached to the procurement of such other license by the salesman is contained in the following clause appearing in the latter part of Sec. 10, namely: "Provided that another license shall not be issued to such real estate salesman until he shall return his former pocket card to the Commission, or shall satisfactorily account to it for same."

(e) There is nothing unreasonable or oppressive in the provision of Sec. 11 that "the revocation of a broker's license shall automatically suspend every real estate salesman's license granted to any person by virtue of his employment by the broker whose license has been revoked pending a change of employer and the issuance of a new license. Such new license shall be issued without charge, if granted during the same year in which the original license was granted."

Since by the salesman's own consent in applying for a license as salesman instead of as broker, he voluntarily assumes the relationship of agent for a named broker to do the various things for the latter specified in Sec. 2 as within the scope and power of a broker, no other result could logically be expected than that when lawful authority to do these things is withdrawn from his principal, he could

not thereafter act as the agent of that principal. A salesman could reasonably anticipate no other result when he applies for a salesman's license, and thereby agrees to serve under a specified principal. Such result is absolutely essential to the proper balance of the relationship between the broker and his employee, the salesman. As noted in another connection, if the salesman should be permitted to proceed in the name of and as the agent of the broker after the latter's license had been withdrawn, there would result not only the incongruity just suggested, but a power on the part of the salesman to bind his principal to provisions or obligations not consented to by him. The inconvenience resulting to the salesman from the revocation of his employer's license is reduced to a minimum by the provision in the last sentence of Sec. 11, that "a new license shall be issued without charge, if granted during the same year in which the original license was granted." The salesman could proceed with his business immediately upon forming a new connection, with some other broker, and the issuance of a new license for the balance of the year.

(f) There is nothing unreasonable or oppressive in the provision of Sec. 12 that "it shall be unlawful for any real estate salesman to accept a commission or valuable consideration for the performance of any of the acts herein specified from any person except his employer, who must be a licensed broker."

As previously noted, the salesman has his choice, under Sec. 8, of qualifying either as a broker or as

a salesman. If he qualifies as a broker he may accept a commission from any one for whom he deals, but on the other hand, if he chooses to qualify and accept a license as a salesman, he thereby voluntarily submits himself to the direction of a specified employer, some broker. In that case, acting as an agent of the broker, necessarily, his compensation must come from that source. Sec. 12 only requires that he shall act in good faith toward his principal. Furthermore, if a salesman licensed as such and, therefore, as the employee of some broker, should be permitted to range beyond that employment and accept compensation from other persons, the efficacy of the statute would be greatly enfeebled, if not wholly destroyed. There would immediately develop a body of persons nominally acting as employees of some specified broker who would perform without license all the powers designated as those belonging to salesmen and brokers in Sec. 2. The result would be that only a few persons would qualify as brokers and these would each have a large retinue of salesmen, merely nominally such, but free lances in fact.

(g) The provision of Sec. 11 is not unreasonable, that requires an annual renewal of the salesman's license. The provision of Sec. 11 in question, reads: "In the absence of any reason or condition which might warrant the refusal of the granting of a license, the Commission shall issue a new license for each ensuing year upon the receipt of the written request of the applicant, and the annual fee therefor, as herein required."

The method of renewal is simple and easy, and it is customary in practically all license laws to require annual renewals. The only impediment in the way of issuing a new license simply on the written request of the applicant, accompanied by the annual fee, would be, the existence of "some reason or condition which might warrant the refusal of the granting of a license." It is observed that the condition or reason must be such as will "*warrant*" the refusal. Manifestly, in case there should be a refusal without any such reason or condition, the Commission could be compelled to issue the license by the writ of mandamus, as in the case of other public officers who refuse to discharge their duties to the public. On such application the burden, of course, would be on the Commission to show the existence of a reason or condition sufficient to warrant the refusal. See further on this point, *infra* pp. 93-95, inclusive.

(h) It is not unreasonable or oppressive that the salesman should be required to obtain a new license when he changes employment. Acting, as he must, under the definition of a salesman contained in Sec. 2, as the employee or agent of a broker, necessarily when his principal ceases to be a broker, or when he himself ceases to be in the employ of his principal, he should obtain employment under some other broker if he desire to continue in the business. This situation logically arises out of Sections 9, 10 and 11. Under Sec. 9, the real estate salesman's license must show the name of the broker by whom he is employed. This license is mailed to the broker by whom the real estate sales-

man is employed, and kept in the custody and control of the broker. To each licensee, which includes both the salesman and the broker, a pocket card shall issue and, in case of the salesman, shall certify that he is a licensed real estate salesman. Under Sec. 10, when a real estate salesman is discharged or terminates his employment with the broker by whom he is employed, it is the duty of the broker to immediately deliver the salesman's license to the Commission, and at the same time address a communication to the last known residence address of the salesman, informing him that his license has been delivered or mailed to the Commission. A copy of this communication is also mailed to the Commission. The last two clauses of Sec. 10 imply that on the return of the pocket card a new license shall be issued to the salesman as agent or employee of the new broker by whom he is employed. The last clause of Sec. 11 covers the same situation when it arises out of the revocation of the broker's license. The revocation of the salesman's authority only lasts, "pending a change of employer and the issuance of a new license. Such new license shall be issued without charge, if granted within the same year in which the original license was granted." This connects up with the last clause of Sec. 10, that is, "no more than one license shall be issued to one real estate salesman for the same period of time." The two connect up with the provision in Sec. 11, that "each license shall expire on the 31st day of December of each year." Manifestly, the result of these various provisions is that when a salesman changes his employer, either by mutual agreement of himself and

his employer, or is discharged by his employer, or when his employer ceases to be a broker and the salesman thereby automatically ceases to be a licensed salesman, he can by application to the Commission, on making a new connection, obtain a new license for the residue of the current year, running up to the 31st day of December.

It is charged in a general way in the bill, as heretofore noted, that the effect of all these provisions is to reduce the real estate salesman to a condition of servitude and make him but the "peon" of a real estate broker, depriving him of his liberty, right to labor, and contract. Manifestly, this charge is not sustained by the provisions as already shown. The salesman has the right, under Sections 1, 2 and 8, to obtain license either as a broker or as a salesman. In either event, he performs exactly the same duties, but if the latter, only as an employee or agent. If he chooses to obtain a license as a salesman instead of as a broker, it is a matter of voluntary choice with him. He is at liberty at any time to sever his connection as a real estate salesman, and thereby cause his license as salesman to be returned, and he can himself return his pocket card, and obtain a new license as salesman if he wishes, or he can obtain a license for the residue of the current year, by submitting to the Commission the proper credentials justifying the issuance to him by the Commission of a license as broker. There is absolute freedom of choice all through both transactions. There is no suggestion in the bill that the financial or moral situation of any of the persons mentioned as salesmen therein is such

that he is compelled to accept service under some broker. There is no hint of compulsion in any form at any time, in the bill.

As to appellees' Point (12).

The Act does not deprive the appellees of their liberty and property without due process of law in the manner complained of in said Point (12). The same is set out on a previous page in Statement of the Case (Ante p. 12, R-40, Sub-Div. 4, Pr. 26, 27). The point, as stated in the bill, involves several distinct contentions in one sentence.

(a) There is no deprivation of liberty and property, in requiring an annual license fee. That the business is of a kind that justifies the requirement of a license, we have shown on former pages (Ante pp. 22 to 25, and 44 to 54).

(b) That it is reasonable to require an annual renewal, we have shown on former pages (Ante pp. 88 and 89).

(c) The suggestion is incorrect, to the effect that the statute justifies the hearing of evidence as to the right of renewal in the absence of the applicant for renewal without any notice to such applicant because of the provision in Sec. 11: "In the absence of any reason or condition which might warrant the refusal of the granting of a license, the Commission shall issue a new license for each en-

suing year upon receipt of the written request of the applicant and the annual fee therefor, as herein required." We have discussed this point to some extent on a prior page (Ante p. 89).

It is apparent that the section does not provide for the hearing of any evidence at all with or without notice. It imposes the duty upon the Commission to issue the renewal license upon the written request of the applicant, accompanied by the annual fee, in the "absence of any reason or condition which might warrant the refusal of the granting of the license." Therefore, in case of the refusal to issue a renewal license, the burden would be thrown upon the Commission to show a good reason therefor in the return to an alternative writ of mandamus, calling upon them to show cause why the renewal license should not be issued. Upon the hearing of the issues raised on the return to the alternative writ of mandamus it would be the duty of the Commission to introduce evidence before the Court, showing the "reason or condition" on which they based their refusal. In response to this, the applicant for renewal would have the right to introduce such evidence as he might find available to sustain his right to a renewal or in rebuttal of the evidence introduced by the Commission. Shannon's Code of Tennessee, Secs. 5331-5339; and specially Secs. 5333 and 5334; Tennessee Code of 1858, Sec. 3567-3575, and specially Secs. 3569 and 3570. Mandamus lies in the State of Tennessee to compel public officers to discharge their duties, as in other jurisdictions. Sh. Code, Sec. 5332, Tennessee Code of 1858, Section 3568.

State ex rel. vs. Alexander, 115 Tenn., 156;

State ex rel. vs. Williams, 110 Tenn., 549;

State ex rel. vs. Hart, 106 Tenn., 269;

Williams vs. Dental Examiners, 93 Tenn.,
619-629.

The substance of these cases is that mandamus will lie to compel officers of the State to act, and the Court will compel them to discharge their duties. It will not, however, in such proceedings control the discretion which the law allows them, yet will examine the facts on which the discretion was exercised, and will restrain and correct all arbitrary and oppressive conduct on their part in the exercise of that power, and will determine the validity in law of the assumed discretion, and if found invalid will compel them to do the thing it was their duty to do and which they refused to do. For example, the Court will not control the discretion of the Commissioners to refuse to issue a renewal if such refusal be based on the existence "of any reason or condition which might warrant the refusal of the granting of a license" (Section 11 of the statute); but the Court itself will determine the question of law as to whether the "reason or condition" relied on by the Commission is valid in law, and also determine either itself or by the verdict of a jury (Shannon's Code of Tennessee, Sec. 5334, 5336; Code of Tennessee of 1858, Sec. 3570, 3572), the existence or non-existence of the facts asserted as a basis for or constituting the reason or condition re-

lied on. If the Commission should refuse to act one way or the other the party claiming a renewal could secure by mandamus an order on the Commission, compelling it to enter an order on its minutes either granting a renewal or refusing it (*State ex rel. vs. Taylor*, 119 Tenn., 229, 246-252), and thereupon the party claiming the renewal could have the matter re-heard under the writ of certiorari pursuant to the authorities cited on a former page hereof, namely (*Ante* pp. 31 and 32). The writ of certiorari was considered so important by our ancestors that it was preserved in express terms in our constitution of 1796, Article 5, Sections 6 and 7; again in our constitution of 1834, Article 6, Section 10; and lastly, in our constitution of 1780 (our existing constitution), in Article 6, Section 10. That section as it appears in the Constitution of 1870, reads:

“The judges or justices of inferior courts of law and equity shall have power in all civil cases, to issue writs of certiorari to remove any cause or the transcript of the record thereof from any inferior jurisdiction into such court of law, on sufficient cause supported by oath or affirmation.”

(d) The quotation in the bill of a sentence appearing in the last part of Sec. 8 (“the Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker’s or salesman’s license, or of any of the officers or members of any such applicant,

prior to the issuance of any such license,") does not apply to renewal licenses, only to the issuance of original licenses, as is apparent from the whole of Sec. 8.

Appellees' point 13 being the same as their point 1, has been considered with that point, and appellees' point 14, we submit, has been sufficiently discussed in the treatment *supra* of their points 2 to 12, inclusive.

SEC. 8 OF THE ACT IS CONSTITUTIONAL

The construction placed by the District Court on that section in its decree, awarding the interlocutory injunction (R. 56, Pr. 40), and in its opinion (pp. R. 70, Pr. 51-2), is erroneous. The three judges based their decision on a single sentence appearing in Sec. 8. That sentence reads: "The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for real estate broker's or salesman's license, or of any of the officers or members of any such applicant, prior to the issuance of any such license."

The construction placed on this passage in the decree of the Court was that the Commission had power not only to require the applicant to furnish

further evidence "but also to procure, independent of the applicant, any and all satisfactory proof it may deem desirable in reference to the honesty, truthfulness, reputation and competency of any applicant, and * * * the statute makes no provision whatever for notice or opportunity to meet this evidence procured by the Commission, nor does it even require that the applicant shall be advised of the nature or the source of the evidence procured, by the Commission, upon which it may refuse to issue a license." In substance, this same construction appears in the opinion of the Court (R. 56, Pr. 40).

Even without the aid of the rule, that every possible presumption is in favor of the validity of a statute, and if it be capable of two reasonable constructions, that one should be selected which would save the statute, rather than the other which would destroy it, we respectfully submit, the construction given by the three judges is obviously unsustainable. The crux of the controversy at this point is the meaning of the word "procure." The three judges held, in substance, that that word was capable of meaning only that the Commission itself should obtain the additional evidence by its own efforts, independent of the applicant and without affording him any opportunity to meet it. Truly a vast expansion of the concept contained in the word "procure."

The guiding rule of construction in such cases is thus expressed in *Neal v. Scruggs*:

“It is a familiar rule in the interpretation of written instruments and statutes that ‘a passage will be best interpreted by reference to that which precedes and follows it.’ So also, ‘the meaning of a word may be ascertained by reference to the meaning of words associated with it.’ In Broom, Leg. Max., p. 523, it is said: ‘It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu*, the coupling of words together shows that they are to be understood in the same sense. And where the meaning of any particular word is doubtful or obscure * * * the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words.’ The same author says (p. 528): ‘In the construction of statutes, likewise, the rule, *noscitur a sociis*, is very frequently applied; the meaning of a word and, consequently, the intention of the Legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *eiusdem generis*, and referable to the same subject-matter.’ ”

Neal v. Scruggs, 95 U. S. 704; 24 L. Ed. 586, 587;

State of Virginia v. State of Tennessee, 148 U. S., 503, 519, Book 37 L. Ed. 537, 543.

United States v. Salen, 235 U. S., 237, 249; 59 L. Ed., 210; 214.

Following this rule, among the definitions given of the word "require," in Webster's New International Dictionary (1911), are the following:

"To demand; to claim as by right and authority; to exact; as, to require the surrender of property."

"To impose a command or compulsion upon one to do something; as, to *require* a man to serve in the army."

The synonyms given are:

"Exact; enjoin; direct; order; demand; need."

Among the definitions given of the word "procure" in the same volume, is the following:

"To contrive; to bring about; to effect; cause; as, to procure a favor to be granted."

The synonym given is the word "obtain." The primary meaning of this word as given in the same volume is:

"To get hold of by effort; to gain possession of; to procure; to acquire, in any way."

This meaning is illustrated in the work just referred to by the following quotation from Shakespeare:

“By guileful fair words peace may be obtained.”

As illustrating the synonyms, the following sentence is given in the text:

“To *procure* is to come into possession of something, often temporarily, especially as a result of search, *request*, or purchase; as ‘all the tracts my father was at the pains to *procure* and study in support of his hypothesis.’”

The foregoing definitions are thoroughly in harmony with, and strictly support the contention stated in our fourth assignment of error, that the District Court should have construed said clause as meaning that the Commission was authorized to require of the applicant, and procure of him through such requirement, such additional evidence as might be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any such applicant. This construction is also in line with the other requirements in Section Eight, placing upon the applicant the duty of bringing before the Commission such evidences in his favor, in the form of affidavits, certificates, etc., as would show his competency and the other qualifications mentioned. The District Court instead of adhering to the rule reproduced above and observing the harmony existing between the words “require” and “procure” and the prior provisions of the section just referred to, all showing full notice to the applicant and co-operation

with him, made a sudden departure, out of harmony with and hostile to every other provision in the section and in the statute, and held that the sentence quoted was subject to no other construction than that the additional evidence must be procured without the knowledge of the applicant and concealed from him, or, the same thing, after being so secured must be used without notice to the applicant.

The said clause quoted from Sec. 8 is also capable of the construction (but this we do not consider essential), that the Commission on requiring additional evidence from the applicant, on receiving from him the names of witnesses desired, could cause these witnesses, if not voluntarily appearing, to come before the Commission under the process of subpoena, pursuant to the following clause appearing in Sec. 15 of the statute:

“The Commission shall have the power to subpoena and bring before it any person in this state or take testimony of any such person by deposition, with the same fees and mileage, in the same manner as prescribed by law in judicial procedure in courts of this state, in civil cases.”

It is true this clause appears in a section relating especially to proceedings in revocation, yet as pointed out in *Fayette County Treasurer v. People & Drivers' Bank*, 47 Ohio State, 503, 523; 10 L. R. A., 196; 25 N. E., 697 and quoted with approval by this court in *Loeb v. Trustees of Columbia Town-*

ship, 179, U. S., at p. 490; 45 L. Ed. at p. 290: "The point is not whether the parts are contained in the same section, for the distribution into sections is purely artificial," etc. The quotation was made with reference to striking out one part of a section and permitting the rest to stand, but the principle remains that the distribution into sections is purely artificial, and the Court will consider the statute as a whole, and apply any part of it as a prevailing principle unless necessarily confined to some special application by the statute itself. We refer to this matter in a prior part of this argument on page 61.

IF THE COURT BE OF OPINION THAT OUR CONTENTION IN RESPECT OF THE CONSTRUCTION OF THE CLAUSE QUOTED FROM SEC. 8 IS ERRONEOUS AND THAT SAID CLAUSE IS UNCONSTITUTIONAL, THEN WE CONTEND IT MAY BE STRICKEN OUT OR DISREGARDED WITHOUT IMPAIRING THE EFFICACY OF THE RESIDUE OF THE STATUTE.

This proposition is sustained by the authorities referred to in our Brief of Argument, sub-division (10) thereof, pp. 26 and 27, *supra*.

The subject is discussed in Board of Supervisors v. Stanley, 105 U. S., 265; 26 L. Ed. 1044, 1050-51.

In the course of that discussion, the Court cited a striking illustration found in the decision of this Court in the case of Florida Central R. R. Co. v. Schutte, 103 U. S., 118; 26 L. Ed., 327, as follows:

“In the case of *The Railroad Companies v. Schutte*, decided at the last term, this point was pressed upon us with much earnestness, and its decision was necessary to the judgment of the court. ‘It is contended,’ said the court ‘that as the provision of the Act in respect to the execution and exchange of the state bonds is unconstitutional, the one in relation to the statutory lien on the property of the company is also void and must fall. We do not so understand the law.’ And yet this was a case in which the scheme of exchanging the bonds of the State for the bonds of the company in order that the company might get the benefit of the better credit of the State, was accompanied by a mortgage created alone by the statute in favor of the State as her security, and the court, while holding that the exchange of bonds was void as being in conflict with the Constitution of the State of Florida, held that the mortgage which secured the bonds of the company, and which was only a mortgage by operation of the same, was valid.”

In *R. R. Co. vs. Schutte*, cited in the foregoing excerpt, the Court added:

“Undoubtedly a constitutional part of a statute may be so connected with that which is unconstitutional, as to make it impossible, if the unconstitutional part is stricken out, to give effect to what, taking the whole together, appears to have been the legislative will. In such a case the whole statute is void; but in this, as in every

other case of statutory construction, all depends on the intention of the Legislature, as shown by the general scope of the law. • • • The striking out is not necessarily by erasing words, but it may be by disregarding the unconstitutional provision, and reading the statute as if that provision was not there."

There can be no denial of the fact that after striking out the clause above quoted from Sec. 8 there still remains enough in the section and in the Act to make the section and the Act both workable, as evincing a clear and consistent scheme of legislation. The intention of the legislature that the residue of the Act should stand in case any provision thereof be held unconstitutional is evidenced beyond any sort of controversy by Sec. 19.

The three learned judges are mistaken in supposing that provisions of this kind are disregarded by this Court.

Ohio River & W. R. Co. v. Dittey, 232 U. S., 576, 594; 58 L. Ed., 737, 746.

This Court especially referred to such a clause in a statute as confirmatory of its views in that case.

In short, as we understand the rule, while the Court with regard to such provisions in an Act will eliminate an unconstitutional clause, and save the residue of the Act if such residue be capable of enforcement, and will presume that such was the intention of the Legislature, even if it contain no

such provision as that embraced in Section 19, yet the presence of such a provision as that contained in Section 19 of the Act, now in question, places, beyond controversy, the intention of the legislature that the residue of the Act should stand if at all workable.

SEC. 8 OF THE ACT GIVES SUFFICIENT NOTICE AND GRANTS AN ADEQUATE HEARING. IT IS NOT LESS THAN THE KIND OF NOTICE AND HEARING CUSTOMARY THROUGHOUT THE COUNTRY IN THE LICENSING OF OCCUPATIONS, AND IS RECOGNIZED BY THIS COURT IN TWO CASES:

Gundling v. Chicago, 177 U. S., 183; 44 L. Ed. 725;

Engel v. O'Malley, 219 U S., 128; 134-138; 55 L. Ed. 128, 135-6.

And see: Hagar vs. Reclamation District No. 108, 111 U. S. 701; 28 L. Ed., p. 569, and especially p. 572.

The application required by Sec. 8 when filed by the applicant with the accompanying affidavits and certificates, together constitute his statement of his case, and an appearance by him before the Commission. He needs no further notice. He needs no further hearing than the consideration of his case on these evidences so tendered by him or furnished by him in addition thereto on requirement of the Commission.

It is the duty of the Commission to issue a license on the proofs so offered if the applicant shall be entitled thereto (See Ante pp. 59 and 60). While the statute does not in express terms provide for any regular or fixed meetings of the Commission, it provides for a regular organization, the establishment of an office or place of business for its meetings, a retinue of clerks and assistants, the keeping of records, the issuance of copies of its proceedings, and further provides that the records of the Commission shall be open to the inspection of the public. (See Ante pp. 60-63.) It is a necessary inference that the office of the Commission shall at all times be open to the public, where any information desired may be obtained by applicants, or other members of the public, at any time.

IF THE COURT SHOULD BE OF OPINION THAT THE ACT ITSELF DOES NOT PROVIDE FOR A NOTICE AND HEARING SUFFICIENT TO COMPLY WITH THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT, A REVIEW MAY BE HAD OF THE PROCEEDINGS OF THE COMMISSION, UNDER THE WRIT OF CERTIORARI, IN THE CIRCUIT COURT OF TENNESSEE, OF THE COUNTY WHEREIN THE COMMISSION HOLDS ITS MEETINGS, AND A FULL HEARING THERE HAD ON THE FACTS AND LAW INVOLVED. THIS JURISDICTION IS PERFECTLY WELL SETTLED BY THE PROVISIONS OF THE CODE OF TENNESSEE, CONSTRUED AND APPLIED BY OPINIONS OF THE SUPREME COURT OF THE STATE, AS TO WHICH THERE IS AND CAN BE NO CONTROVERSY. THESE ARE REFERRED TO IN OUR BRIEF OF THE ARGUMENT. (SUB-DIVISION 12) ANTE P. 31-33. SEE ALSO ANTE P. 62.

See also *Brewing Co. vs. Currier*, 126 Tenn., 535; 543-9;

Fertilizer Co. vs. McFall, 128 Tenn., 645, 652-3.

THE THREE LEARNED JUDGES WERE IN ERROR IN THEIR HOLDING TO THE EFFECT THAT THIS COURT HAS DECIDED THAT IT IS CONFINED TO THE FACE OF THE ACT IN QUESTION, AND CANNOT CONSIDER OTHER STATUTES OF THE STATE, AND THE SETTLED DECISIONS OF ITS HIGHEST COURT OF LAST RESORT FOR THE PURPOSE OF ASCERTAINING WHETHER THE LAWS OF THE STATE PROVIDE FOR A REVIEW OF THE PROCEEDINGS OF THE COMMISSION.

This point is presented in Sub-division 11 of our Brief of the Argument, to which we refer. (Ante pp. 27-32). We there cite numerous cases in which it appears that this Court referred for the purpose indicated to other statutes and decisions of the State, whose Acts were under examination for the purpose of ascertaining whether a review was granted by the laws of the State. On the pages referred to it is shown that in not one of the cases relied on by the three learned judges in their opinion, was there any question as to the existence of any other law of the state granting relief of the kind indicated.

Reaffirming this statement with regard to all of those cases, we now submit a brief summary of the contents of each of them.

Security & Trust Co. v. Lexington, 203 U. S. 323-333; 51 L. Ed. 204-208.

While the Court in this case did make reference to the fact that the tax statute, under which the back-tax assessment was made, did not provide for notice, the Court did not have the question before it and did not decide whether the same right (notice) or a review of the matter might not be conferred by some other statute. The Court also held that although no right to notice was conferred by the act in question, yet that if a trial of the matter was actually granted, the tax-payer had no right to complain of the absence of the provision for notice in the statute.

The Court held that, having enjoyed a hearing in that case, it was immaterial by what authority it was granted but intimated that other statutes might be referred to as in *McMillen v. Anderson*, 95 U. S., 37; 24 L. Ed. 335 and *Hagar v. Reclamation District* 108, 111 U. S. 701; 28 L. Ed. 569. We refer *infra* fully to these cases.

Paulsen v. City of Portland, 149 U. S., 30-41; 37 L. Ed., 637-641.

The ordinance of the city of Portland, in question, did not contain any provision for notice whatever, but this court laboriously worked out a right to notice by reference to and construction of the city charter; the construction of the city charter by the Supreme Court of the state; the fact that viewers to estimate the burden which each piece of property should bear were appointed by the city authorities; that the ordinance directed that the viewers should hold stated meetings at a named place, and that all persons might be heard by them in the matter of making the estimate; that the viewers upon their appointment gave notice by publication in the official paper of the city, of the time of their first meeting; that the terms of this notice not appearing, the court would presume that it was sufficient in form and substance; that although such notice was not prescribed by the ordinance, the Court would imply that notice of some kind was intended from the fact that the ordinance provided for stated meetings of viewers at a certain place; that a proper notice in fact was given would be inferred from the circumstance that the viewers reported to the city council what they had done, stating "that they had, in accordance with the requirements of ordinance 5068, given notice by publication, and the council in the subsequent ordinance, 5162, recites that their report is satisfactory and is adopted." The Court adding:

"In other words, the council by this latter ordinance, approved the construction placed by the viewers on the first, to the effect that it required notice."

The Court concludes the discussion with the following paragraph:

“Without continuing this inquiry any further, we are of the opinion that notwithstanding the doubt arising from the lack of express provision for notice in ordinance 5068, it cannot be held, in view of the notice which was given, of the construction placed upon this ordinance by the council thereafter, and the approval by the Supreme Court of the proceedings, as in conformity to the laws of the state, that the provisions of the Federal Constitution, requiring due process of law, have been violated.”

Truax v. Raich, 239 U. S., 33; 60 L. Ed., 131.

The question of a hearing before any Board or Commission, or the right to any hearing at all did not arise in this case. The statute was a peremptory requirement that no aliens should be employed except in a number bearing a certain proportion to the number of other workers.

Chicago, etc., R. R. Co. v. Minnesota, 134 U. S., 418; 33 L. Ed., 970-980.

In this case, the Court based its decision that the Act in question denied due process of law, thus violating the Fourteenth Amendment, on the ground

that the Supreme Court of Minnesota had construed the Act to mean that the Railroad & Warehouse Commission had the right, and its duty was, to fix the rates of transportation without granting to the Railroad Company any hearing whatsoever, as to the reasonableness of the rate, and that its action was final and conclusive. This Court held that the Act having been so construed by the Minnesota Supreme Court, and this construction being a binding one, on this court, the said Act sanctioned the exercise of purely arbitrary power by the Commission; this Court construing the decision of the Supreme Court of Minnesota as holding "that the law neither contemplates nor allows any issue to be made or inquiries to be had as to their (rates) equality or reasonableness in fact."

Central Georgia Railroad Company v.
Wright, 207 U. S., 127; 52 L. Ed., 134.

The ground of the Court's decision in this case was that the Georgia statute as construed by the Supreme Court of that State, denied the Railroad Company the right to be heard upon either the question of the taxable character of the property or the amount of the assessment; that the Company's failure to return the property precluded it from any hearing on the point stated. This, the Court said, was a denial of due process of law. There was no question considered of relief being grantable under any other statute or law of the state, and it is plain from the opinion that there could be no other.

In the course of the opinion, reference with approval was made to *Security, Trust & S. V. Co. v. Lexington*, 203 U. S., 323; 51 L. Ed. 204, and the following language used:

“It was there held, that before an assessment of taxes could be made upon omitted property, notice to the tax-payer with an opportunity to be heard was essential, and that somewhere during the process of the assessment the tax-payer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace. In that case it was further held that where the procedure in the State Court gave the tax-payer an opportunity to be heard upon the value of the property, and the extent of the tax in a proceeding to enjoin its collection, the requirement of due process of law was satisfied.”

The language occurring in the preceding excerpt (“and that this notice must be provided as an essential part of the statutory provision”) was a matter *arguendo* merely, and we submit must be considered in relation to the fact that neither in the 203 U. S. case referred to, nor in the case before the Court, was there any question of rights given by other statutes of the state, or recognized by a decision of the highest court of final resort of the state, granting a re-examination of the question. The antithesis was between a right accorded by the laws of the state and a hearing accorded a tax-payer

by the mere grace or indulgence of the court trying the case.

Coe v. Armour Fertilizer Works, 237 U. S.,
413-424; 59 L. Ed. 1027-1031.

The case was this:

Coe was a stockholder in a corporation against which a judgment had been rendered and execution issued and returned no property of the corporation to be found whereon to levy. Thereupon, under certain sections of the Florida revised statutes referred to in the opinion, an execution was issued against Coe personally, and levied on his land, with a view to compelling him to pay on the execution such a sum of money as he might owe to the corporation on his unpaid stock subscription. The section of the revised statutes referred to provided for no notice to Coe or to other stockholders. "Against one and all execution may be issued without notice or hearing; the judgment against the corporation and the records of stockholdings and stock subscriptions found upon the books of the corporation, being treated as conclusive against those named as stockholders. If a person against whom execution is thus issued as for an unpaid stock subscription does not happen to receive notice extra-officially, or receiving it, makes no objection, his property is taken in satisfaction of the corporation's debt, manifestly without due process of law." Id. p. 424; 59 L. Ed., 1031.

After some observations not pertinent to the present inquiry, the Court added: "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the constitution requires." The Court then goes on to illustrate by citations from several cases, and to enforce the principle that the right to a hearing must rest upon law and not upon the mere grace or discretion of courts. In this part of the discussion, the Court cites several of the cases we have examined above, and used the word "statute," but evidently not with a view to confining the right to any particular statute.

The other cases cited by the three judges in support of their decision that no other statute can be relied on except the special statute or act in question, are: *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132-144; 53 L. Ed. 441-446, and the case of the *Ohio Valley Water Company v. Ben Avon Borough*, 253 U. S. 288-292; 64 L. Ed. 908, 913-915. We have already reviewed these cases sufficiently in our Brief of Argument (Ante pp. 30 and 31).

Other cases in which this Court referred to state statutes other than the one imposing the burden and relied on such other statutes either wholly or in part as relieving the objection to the statute in question arising under the due process clause of the Fourteenth Amendment, are as follows:

McMillen v. Anderson, 95 U. S., 37; 24 L. Ed. 335-36.

In this case it appeared that plaintiff had been assessed for a license tax of \$100.00, in the usual summary way; that upon subsequent notice to pay this tax within ten days, he failed to do so, and his property was levied on and was about to be sold; that he brought an action of trespass against the officer and obtained a temporary injunction; that the officer pleaded that the seizure was made in the exercise of his duty, for taxes due; that upon a full hearing the Court sustained the defense; that this judgment was affirmed by the Supreme Court of Louisiana; that in the petition for appeal to the Supreme Court of Louisiana, plaintiff made the point that the statute under which the burden was imposed violated the Federal Constitution; that the cause was removed to this court by writ of error; that in this Court plaintiff specified the due process clause of the Fourteenth Amendment as the provision of the constitution which was violated. This Court, after referring to certain provisions as to notice in the statute complained of, added in further support of its judgment, the following:

“Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that State, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money as paid under duress, if the tax was illegal.

But, however that may be, it is quite certain that he can, if he is wrongfully taxed, stay the proceedings for its collection by process of injunction. See Fouqua, Code of Pr. La., Arts. 296-309, inclusive. The Act of 1874 recognizes this right to an injunction, and regulates the proceedings when issued to stay the collection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction."

The statute under attack was the Act of March 14, 1873.

Hagar v. Reclamation District Number 108,
111 U. S. 701; 28 L. Ed. 569.

In this case, arising in California, the Court referred to Reclamation District No. 108 v. Evans, 61 Calif. 104, to prove that the action had under the Reclamation statute might be contested in a suit brought to enforce the assessment, and that in the defense of such suit the complaining party might set forth all of his grievances.

In this case, the Court distinguished between license taxation and others of a similar character wherein no property valuation is needed, and tax cases wherein such valuation is essential. After stating that in the matter of license taxes no notice can be given to the tax-payer, the Court added

that in cases where a valuation of property is required, a different rule exists, that is a hearing in some form. Specifying the different means by which this hearing is given so as to comply with the due process clause, the Court made the following observation, referring to the existence of various laws in the states:

“In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment, which can be deemed essential to render the proceedings due process of law.”

Dent v. State of West Virginia, 129 U. S. 114; 32 L. Ed. 623, 627.

In this case a controversy arose as to the right of a physician to obtain a license from a board established by law to license physicians. After stating that there was nothing of an arbitrary character in the statute, the opinion goes on to specify the protection secured to the applicant by law, as follows:

“It authorizes an examination of the applicant by the board of health as to his qualifications when he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practiced in the State a designated period before March, 1881. If, in the proceedings under the statute, there should be any unfair or unjust action on the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the State. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the board after it had decided that the diploma he presented was insufficient.” *Id.* 32 L. Ed. pp. 626-7.

Palmer v. McMahon, 113 U. S. 660, 33 L. Ed. 772, 775-76.

In this case, one question considered was whether a certain law of New York was void as depriving plaintiff of his property without due process of law. The Act in question was Chapter 230 of the laws of New York of 1843. To show that the clause referred to was not violated, the Court referred to other statutes of New York as follows:

Laws of New York, 1859, Ch. 302, Sec. 10, p. 681, which gave opportunity for objection before the tax commissioners, and to Sec. 20 of the aforesaid Act of 1859, which provided that if the taxpayer should be dissatisfied with the final action of

the Commissioners he could have such final action reviewed under the writ of certiorari.

Reetz v. Michigan, 188 U. S. 505, 507-510; 47 L. Ed. 563, 565-567.

In this case (physician's license), while the Court held that the hearing before the Board was sufficient, and that the existence of a right of appeal from the decision of the Board was not essential to due process of law, the opinion did refer to a decision of the Supreme Court of Michigan (*Metcalf v. State Board of Registration*, 123 Michigan, 661) as proving that the matter might be re-examined on the merits, under a petition for the writ of mandamus issued from a court.

Wadley S. R. Co. v. Georgia, 235 U. S. 651, 666-667, 59 L. Ed. 405, 413-414.

The litigation in this case arose out of a controversy between a shipper and the railroad company as to a discrimination in rates. A proceeding was instituted before the Board of Railroad Commissioners, and that board rendered a decision in favor of the shipper and against the company. The company served notice on the Commission that it declined to obey its ruling. Thereupon, a suit was brought against the railroad company, under the Georgia Act of August 26th, 1907, to recover the

fine thereby imposed for the failure to obey the rulings of the Commission. The section of the Code under which the order of the board was made did not provide for notice and an opportunity to be heard, but the Supreme Court of Georgia held that it must be construed in connection with other parts of the Railroad Commission law which did contain such provisions. The company contended, however, the fine was so large (\$5,000.00 a day) for violating the orders of the Commission, that it operated to prevent an appeal to the courts. This Court said in its opinion that the decisions of the Commission were not absolutely binding, but as the Supreme Court of Georgia had held, in the controversy then before the Court, might be questioned in defense of a suit brought to enforce the penalty. The Court then said that in addition, other relief might be obtained through the writ of injunction, citing several Georgia cases. Finally, however, as conclusive of the whole matter, the Court said:

“And, in the second place, provision is made for the institution of suits against the Railroad Commission of Georgia when its acts are illegal or unconstitutional (Civil Code (Ga.) 1911, Sec. 2625). From an examination of that section of the Code it is quite clear that it recognizes the right to a judicial review of administrative orders. Until it has been given a contrary construction by the state court, it must be here construed in such a way as to leave it valid, and as conferring that sort of right which furnishes the adequate and available remedy which meets the requirement of

the Constitution. Any other construction would not only impute to the legislature an intent to deny the equal protection of the law, and to permit the carrier to be deprived of property without due process of law, but it would operate to nullify the penalty section as a whole. Giving, then Sec. 2625 that construction which makes it constitutional, and it appears that the laws of Georgia gave to the Wadley Southern R. R. Co. the right to a judicial review of the order of March 12, 1910, by a suit against the commission."

And see: *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 545; 58 L. Ed. 713, 719.

The foregoing principles are recognized and the Federal cases followed in *Fertilizer Company v. McFall*, 128 Tenn., 645, 652-656, and *Brewing Co. v. Currier*, 126 Tenn. 535-548.

O'Neil v. Northern Irrigation Company, 242 U. S., 20, 24, 27; 61 L. Ed. 123, 128, 129.

In this case, the Irrigation Act complained of was passed in 1879, and granted no right of a hearing to persons of the class represented by the plaintiff. The Court, however, in its opinion, referred to a subsequent statute passed February 23, 1881, and construed it as having so enlarged the previous statute as to afford the plaintiff an opportunity of a judicial hearing within four years after a final decree in any water district to "all parties whose

interests are thereby affected." It does not appear that the statute of 1881 was an amendment to that of 1879, but apparently was one to be construed in *pari materia*.

In the Court below, counsel for appellees referred to *State v. Del Rio Turnpike Company*, 131 Tenn., 600, as supporting the proposition that resort can be had alone to the terms of a statute creating an administrative board or commission for the purpose of determining whether the right to notice and hearing exists under the laws of the State on behalf of the property owner prior to the taking of his property; that if such right be not found within the statute, the due process clause contained in the Fourteenth Amendment to the Federal Constitution, and in Article 1, Sec. 8 of the Tennessee Constitution, must be held violated.

This is an erroneous conception of the case referred to.

That case was to this effect:

The Tennessee Act of 1835, Ch. 54 (Shannon's Code, Sec. 1748, et seq) provided, in substance, that the County Court of each county in the State should appoint three superintendents, whose duty would be to look over the turnpike roads and bridges of the county and see that they were kept in repair, as required by law; that whenever, in the opinion of a majority of these superintendents, any road or bridge should be found manifestly in bad

condition, they might order the gates opened and kept open until the pike or bridge should be put in good condition; that after such opening of the pike or bridge by the three superintendents, any owner who should demand or receive toll should be indicted, and on conviction, the charter of the company declared forfeited.

Notwithstanding such an order made in 1914 against it by the three superintendents of Williamson County, the Del Rio Turnpike Company continued to keep its gates closed and collect tolls as theretofore. An indictment followed. The company demurred on the ground that the Act of the Legislature was unconstitutional because violative of the Fourteenth Amendment to the Federal Constitution and of Article 1, Section 8 of the State Constitution, as taking property without due process of law.

The trial judge sustained the demurrer, and on appeal by the State, this judgment was affirmed. The Supreme Court of Tennessee held, in substance, that the Act purported to confer purely arbitrary powers on the three superintendents, brooking no question and was instant and conclusive in its operation. The Court compared it to the summary power exercised in the destruction of property imminently dangerous to the safety, or offensive to the morals of the community, to be abated as a nuisance; instancing the power to kill cattle suffering from a contagious disease, to destroy diseased fruit trees, to destroy decaying foodstuffs, infected clothing, obscene books or pictures and imminently dangerous structures; and the power to destroy or

tear down houses not in themselves dangerous, but which stand in the path of a conflagration. The Court indicated that while the statute did not in terms declare a turnpike so conditioned a nuisance, yet its requirement was an immediate forfeiture of the use of the road to the public without the payment of tolls and the consequent immediate suspension of the company's franchise pending the continuation of the bad condition, hourly being made worse, by the increased travel incident to free passage.

Taking this view of the conclusive character of the statute, it naturally did not occur to the Court to differentiate the case then before it, from those embraced within the scope of prior well-considered and unquestioned decisions of the same court, which were, of course, quite familiar to the learned and able judge, who delivered the opinion in the case, as well as to the other members of the Court. These other cases and the statutes on which they are based are cited under proposition (12) of the Brief of Argument (Ante pp. 31-33), to which may be added the cases of *Fertilizer Company v. McFall*, 128 Tenn., 645; *East Tennessee Brewing Company v. Currier*, 126 Tenn., 535.

In each of the two cases just cited is evidenced the fixed view of the Tennessee Supreme Court on the question of constitutional law involved, in harmony with the decisions of this Court, and a settled course of decision in Tennessee to the effect that if the right to a hearing be not granted by the Act which creates a burden, that hearing is provided

for elsewhere in the laws of the State, and may be availed of by the citizen who deems himself oppressed or in any way aggrieved by the Act. In *Curriers Case* (126 Tenn.) the Tennessee Supreme Court (on page 546-7) points out three of such other remedies, viz.: the writ of *certiorari*, applicable to both state and county taxes, the writ of injunction as to county taxes, and the payment, under protest as to state charges "with the privilege of suit for their recovery, to have the merits of each claim for taxes fully heard and considered." In the *McFall case* (128 Tenn.) that Court (at p. 652-3) recognizes the applicability and efficiency of the writ of *certiorari* as furnishing a means of reviewing the decisions of administrative boards, to the end "that at some stage of the proceedings he be given an opportunity to be heard and present his rights before an impartial tribunal." What was held in the two cases just referred to as applied to taxes, applies generally to all administrative boards as shown by the cases referred to in the *Brief of the Argument* (Ante pp. 31-33, Point 12). It may be added that while the writ of injunction does not apply to state taxes as above indicated, it does apply to the assertion of any other right claimed under an alleged unconstitutional Act (Ante pp. 33 and 34).

We refrain from discussing any of the remaining propositions contained in our "*Brief of the Argument*," believing that they need no further presentation than the statement of them as there appearing, supported by the authorities cited under each.

We shall only add on propositions 15 and 16 in the Brief of Argument (Ante pp. 38 and 39) and on the propositions of error numbers 10 and 11 (Ante pp. 20 and 21) the following:

We submit that the appellees not having applied to the Commission for license, and there suffered a refusal, should not be heard under Section 266 of the Judicial Code, to question the constitutionality of the Act. A doubt of the right to complain under such circumstances, was first suggested by this Court in *Gundling v. Chicago*, 177 U. S. 183, 186; 44 L. Ed. 725, 728, but the Court waived the doubt and proceeded to consider the case. This doubt has now been resolved against the appellees by the decision in *Farncomb v. City and County of Denver*, 252 U. S. 7, 11, 12; 64 L. Ed. 424, 427. We submit also that the appellees not having applied to the Commission for a license and there suffered a refusal are not injured by the Act and are, therefore, not members of any class entitled to question the constitutionality thereof. As said in *Gundling v. Chicago*, *supra*:

“He made no application for a license and of course the mayor has not refused it. *Non constat* that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused a license.”

Gundling v. Chicago, 177 U. S. on p. 186;
44 L. Ed. on p. 728;

Bradley v. Richmond, 227 U. S. 477; 485-486;
57 L. Ed. 603, 606-607;

Farncomb v. City and County of Denver,
252 U. S. 7, 12, 64 L. Ed. 427;

Plymouth Coal Co. v. Pennsylvania, 232 U.
S. 531, 544, 545; 58 L. Ed. 713, 719.

Respectfully submitted,

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EXHIBIT A.

APPENDIX TO BRIEF

Chapter No. 98

House Bill No. 623

AN ACT to define, regulate and license real estate brokers and real estate salesmen; to create a State Real Estate Commission, and to provide a penalty for a violation of the provisions hereof.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall be unlawful for any person, firm, partnership and association copartnership, whether operating under an assumed name or otherwise, from and after July first, nineteen hundred and twenty-one, to engage in the business or capacity either directly or indirectly, of a real estate broker or real estate salesman within this state, without first obtaining a license under the provisions of this Act. License shall be granted only to persons who are trustworthy and bear a good reputation for honesty and fair dealing, and are competent to transact the business of a real estate broker or real estate salesman, in such manner as to safeguard the interests of the public and only after satisfactory proof thereof has been presented to the commission.

Sec. 2. Be it further enacted, That a real estate broker within the meaning of this Act, is any per-

son, firm, partnership, association, co-partnership or corporation, who for a compensation or valuable consideration engaging in the business, buys or offers to buy, or negotiate the purchase or sale or exchange of real estate, or who leases or offers to lease or rents or offers for rent any real estate or the improvements thereon for others, as a whole or partial vocation. A real estate salesman, within the meaning of this Act, is any person who for a compensation or valuable consideration is employed either directly or indirectly by a licensed real estate broker to sell or offer to sell or buy or offer to buy, or to negotiate the purchase or sale or exchange of real estate or lease or offer to lease, rent or offer for rent any real estate for others as a whole or partial vocation. The provisions of this Act shall not apply to any person, firm, partnership, association, copartnership or corporation, who as owner or lessor shall perform any of the acts aforesaid, with reference to property owned by them nor shall the provisions of this Act apply to persons holding a duly executed power of attorney from the owner for the sale, leasing or exchange of real estate, nor shall this Act be construed to include in any way the services rendered by an attorney at law in the performance of his duties as such attorney at law nor shall it be held to include a receiver, trustee in bankruptcy, administrator or executor, or any person selling real estate under order of any court, nor to a trustee selling under a deed of trust.

Sec. 3. Be it further enacted, That one Act for Compensation
for Buying
and Selling
a compensation or valuable consideration of buy-

ing or selling real estate of, or for another, or offering for another to buy or sell or exchange real estate or leasing or renting or offering to rent real estate except as herein specifically excepted, shall constitute the person, firm, partnership, association, co-partnership or corporation performing, offering or attempting to perform any of the acts enumerated herein a real estate broker or a real estate salesman within the meaning of this Act.

**Real Estate
Commission,
Members of**

Sec. 4. Be it further enacted, That, there is hereby created the Tennessee Real Estate Commission. Said Commission shall be appointed by the Governor of the State which shall consist of three persons of which no more than two shall be composed of the same political party, one from each Grand Division of the State of Tennessee, whose vocation for a period of at least ten years prior to the date of their appointment shall have been that of a real estate broker or a real estate salesman; one member shall be appointed for a term of one year; one member shall be appointed for a term of two years; one member shall be appointed for a term of three years and until their successors are appointed and qualified; thereafter the term of the members of said Commission shall be for three years and until their successors are appointed and qualified. Members to fill vacancies shall be appointed for the unexpired term. The commission, immediately upon the qualification of the member appointed in each year shall organize by selecting from its members a President, and may do all things necessary and convenient for carrying into effect the provisions of

**Term of
Office**

Vacancies

Organization

this Act and may, from time to time, promulgate necessary rules and regulations. Each member of the Commission shall receive, as full compensation for each day actually spent on the work of said commission, the sum of ten (\$10.00) dollars per day, not to exceed six hundred (\$600.00) dollars in any one calendar year, and his actual and necessary expenses incurred in the performance of duties pertaining to his office.

Compensation

Sec. 5. Be it further enacted, That the Commission shall employ, and at its pleasure discharge a Secretary and such clerks and assistants as shall be deemed necessary to discharge the duties imposed by the provisions of this Act, and shall outline their duties and fix their compensation, subject to the general laws of the State. The Commission shall obtain such office space, furniture, stationery, fuel, light, and other proper conveniences as shall be reasonably necessary for carrying out the provisions of this Act.

Employees

Sec. 6. Be it further enacted, That the Commission shall adopt a seal with such design as the Commission may prescribe engraved thereon, by which it shall authenticate its proceedings, copies of all records and papers in the office of the Commission, duly certified and authenticated by the seal of said Commission, shall be received in evidence in all courts equally, and with like effect as the original. All records kept in the office of the Commission under authority of the Act shall be open to the public inspection under such rules and regulations, as shall be prescribed by the Commission.

**Seal of
Commission**

**Records of
Office**

Fees
Collected

Sec. 7. Be it further enacted, That all fees and charges collected by the Commission under the provisions of this Act shall be paid into the general fund in the State Treasury.

Expenses

All expenses incurred by the Commission under the provisions of this act including compensations to members, secretaries, clerks and assistants, shall be paid out of the general fund in the State Treasury upon warrants of the comptroller from time to time, when vouchers therefor are exhibited and approved by the Commission, provided, that the total expense for every purpose incurred, shall not exceed the total fees and charges collected and paid into the State Treasury under the provisions of this Act.

Licenses,
Application for

Sec. 8. Be it further enacted, That all applications for license shall be made in writing to the Commission. Such applications shall also be accompanied by the recommendation of at least two citizens, real estate owners, not related to the applicant, who have owned real estate for a period of one year or more, in the county in which said applicant resides, or has his place of business, which recommendation shall certify that the applicant bears a good reputation for honesty, competency, and fair dealing, and recommending that a license be granted to the applicant. Every applicant for a license shall furnish a sworn statement setting forth his present address, both of business and residence, the complete address of all former places where he may have resided or been engaged in business, or acted as a real estate salesman, for

a period of sixty days or more, during the last five years, and the length of such residence together with the name of at least one real estate owner in each of the said counties where he may have resided, engaged in business, or acted as a salesman. Every applicant for a broker's license shall also state the name of the person, firm, partnership, co-partnership or corporation, and the location of the place, or places for which said license is desired, and set forth the period of time, if any, which said applicant has been engaged in the business, and shall be executed by such person, or by an officer or member thereof. Every real estate broker shall maintain a place of business in this state. In case a real estate broker maintains more than one place of business within this State, a duplicate license shall be issued to such broker for each branch office so maintained. Each duplicate license shall be issued without additional charges.

Every applicant for a salesman's license, shall, in addition to the requirements of the first paragraph of the section, also set forth the period of time, if any, during which he has been engaged in the business, stating the name of his last employer, and the name of the place of business of the person, firm, partnership, co-partnership or corporation then employing him, or in whose employ he is to enter. The application shall be accompanied by a written statement by the broker in whose employ he is to enter, stating that in his opinion, the applicant is honest, truthful and of good reputation, and recommending that the license be granted to the applicant. The Commis-

**Salesmen,
License of**

sion shall have the right to prescribe the form of application for all license. The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker's or salesman's license, or, of any of the officers or members of any such applicant, prior to the issuance of any such license. The Commission is expressly vested with the power and authority to make, prescribe and enforce any and all such rules and regulations connected with the application for any license, as shall be deemed necessary to administer and enforce the provisions of this Act.

**License,
Description of**

Sec. 9. Be it further enacted, That the Commission shall issue to each licensee, a license in such form and size as shall be prescribed by the Commission. This license shall show the name and the address of the licensee, and in case of a real estate salesman's license, shall show the name of the real estate broker by whom he is employed. Each license shall have imprinted thereon the seal of the Commission, and in addition to the foregoing, shall contain such matter as shall be prescribed by the Commission. The license of each real estate salesman shall be delivered or mailed to the real estate broker by whom such real estate salesman is employed, and shall be kept in the custody and control of such broker. It shall be the duty of each real estate broker to conspicuously display his license in his place of business. Notice in writing shall be given the Commission by each licensee of any change, or principal business loca-

tion, whereupon the Commission shall issue a new license for the unexpired period without charge. A change of business location, without notification to the Commission, and without the issuance by it, of a new license shall automatically cancel the license theretofore issued. The commission shall prepare and deliver to each licensee a pocket card, not larger than two and one-fourth inches in width and three and three-fourth inches in length, which card, among other things, shall contain the name and address of the employer, and shall contain an imprint of the seal of the Commission, and shall certify that the person whose name appears thereon, is a licensed real estate salesman or real estate broker, as the case may be; the matter to be printed on such pocket card, except as above set forth shall be prescribed by the Commission.

Sec. 10. Be it further enacted, That when any real estate salesman shall be discharged or shall terminate his employment with the real estate broker by whom he is employed, it shall be the duty of such real estate broker to immediately deliver, or mail by registered mail, to the Commission such real estate salesman's license. The real estate broker shall at the time of mailing such real estate salesman's license to the Commission, address a communication to the last known residence address of such real estate salesman which communication shall advise such real estate salesman that his license has been delivered, or mailed to the Commission. A copy of such communication to the real estate salesman shall accompany the license when mailed or delivered to the Com-

**Salesman's
License,
Return of,
When**

mission. It shall be unlawful for any real estate salesman to perform any of the acts contemplated by this Act, either directly or indirectly under authority of said license from, and after, the date of receipt of the said license from said broker by the Commission. Provided, that another license shall not be issued to such real estate salesman until he shall return his former pocket card to the Commission, or shall satisfactorily account to it for same. Provided, further, that not more than one license shall be issued to any real estate salesman for the same period of time.

License Fees

Sec. 11. Be it further enacted, That the first annual fee for each real estate broker's license shall be twenty (\$20.00) dollars, and a renewal shall be ten (\$10.00) dollars; the first annual fee for such real estate salesman's license shall be ten (\$10.00) dollars and a renewal shall be five (\$5.00) dollars. Each real estate broker's license which may be granted to an individual, shall entitle such individual to perform all of the acts contemplated by this Act without any further application upon his part and without payment of any fee other than the real estate broker's annual fee. Each real estate broker's license granted to any firm, partnership, association, co-partnership, or corporation consisting of more than one person, shall entitle such real estate broker to designate one of its officers or members, who upon compliance with the terms of this Act shall without payment of any further fee, upon issuance of said broker's license be entitled to perform all of the acts of a real estate salesman contemplated by this Act.

The person so designated, however, must make application for a salesman's license which application shall accompany the application of the real estate broker, and be filed with the Commission, at the same time as the application for the real estate broker for license. If in any case the person so designated by the real estate broker shall be refused a license by the Commission, or in case such person ceases to be connected with such real estate broker, said broker shall have the right to designate another person, who shall make application as in the first instance. Every application for a license under the provisions of this Act, shall be accompanied by the license fee herein prescribed, and every license shall expire on the thirty-first day of December of each year. In the absence of any reason or condition which might warrant the refusal of the granting of a license, the Commission shall issue a new license for each ensuing year, upon receipt of the written request of the applicant; and the annual fee therefor, as herein required. The revocation of a broker's license shall automatically suspend every real estate salesman's license granted to any person by virtue of his employment, by the broker, whose license has been revoked pending a change of employer, and the issuance of a new license. Such new license shall be issued without charge, if granted during the same year in which original license was granted.

License,
Application f

Sec. 12. Be it further enacted, That it shall be unlawful for any real estate salesman to accept a commission or valuable consideration for the per-

Extra
Commission
Prohibited

formance of any of the acts herein specified from any person except his employer, who must be a licensed real estate broker.

Sec. 13. Be it further enacted, That before any person, firm, partnership, association, corporation or salesman, shall be permitted to open, engage in, manage or conduct any real estate agency or office, or deal in real estate, or rent collections as agent or broker or salesman, either in an office or otherwise, such person, firm, partnership, association, corporation or salesman, shall give a bond to the State of Tennessee, executed by two good and sufficient sureties to be approved by the Commission or by a Surety Company, duly authorized to do business in this State, in the sum of One Thousand Dollars, said bond to be in a form approved by the Commission, and for the use and benefit of all persons who may be injured or aggrieved by the wrongful acts or defaults of such person, firm, partnership, association or corporation and any person, so injured or aggrieved, may bring suit on such bond in his, or her name, and may recover thereon.

complaints,
investigation of

Sec. 14. Be it further enacted, That the Commission may, upon its own motion, and, shall upon the verified complaint in writing of any person investigate the actions of any real estate broker, or real estate salesman, or any person who shall assume to act in either such capacity within this State and shall have the power to suspend for a period less than the unexpired portion of the licensed period, or to revoke any license issued under the

provisions of this Act at any time where the license, in performing, or attempting to perform any of the acts mentioned herein is deemed to be guilty of

(a) Making any substantial misrepresentation,
or

(b) Making any false promises of a character likely to influence, persuade or induce, or

License May
Be Revoked
for

(c) Pursuing a continued and flagrant course of misrepresentation or the making of false promises through agents or salesmen or advertising or otherwise, or

(d) Acting for more than one party in a transaction without the knowledge of all parties thereto, or

(e) Representing or attempting to represent a real estate broker other than the employer, without the express knowledge and consent of the employer, or

(f) Failure to account for, or to remit for, any moneys coming into his possession which belongs to others, or

(g) Paying a commission or valuable consideration to any person not licensed under the provisions of this Act.

(h) Has demonstrated unworthiness or incompetency to act as a real estate broker or salesman in such manner as to safeguard the interests of the public.

(i) Any other conduct whether of the same or a different character than hereinbefore specified, which constitutes dishonest dealing.

This Act shall not be construed to relieve any person from civil liability, or criminal prosecution, under the general laws of this State.

Sec. 15. Be it further enacted, That the Commission shall before suspending or revoking any license and at least ten days prior to the date set for the hearing, notify in writing, the holder of such license, of any charge made, and shall afford said licensee an opportunity to be heard in person or by counsel in reference thereto, such written notice may be served by delivery of same, personally, to the licensee or by mailing same by registered mail, to the last known business address of such licensee. If said licensee be a salesman, the Commission shall also notify the broker employing him of the charges, by mailing notice by registered mail to the broker's last known business address. The hearing on such charges shall be at such time and place as the Commission shall prescribe. The Commission shall have the power to subpoena and bring before it any person in the State or take testimony of any such person by deposition, with the same fees and mileage in the same manner as prescribed by law in judicial procedure in Courts

License,
Notice of
Revoking

of this State in civil cases. If the Commission shall determine that any licensee is guilty of a violation of any of the provisions of this Act, said licensee shall be suspended or revoked.

The findings of this fact made by the Commission, acting within its powers, shall in the absence of fraud be conclusive, but the Supreme Court shall have the power to review questions of law involved in any final decision or determination of the Commission: Provided, that application is made by the aggrieved party within thirty days after such determination, by certiorari, mandamus or by any other method permissible under the rules and practices of said Court or the laws of this State, and to make such further orders in respect thereto as justice may require.

**Right of
Appeal**

Sec. 16. Be it further enacted, That any unlawful act or violation of any of the provisions of this Act upon the part of any real estate salesman, or employee, or of any officer or member of a licensed real estate broker, shall not be cause for the revocation of a license of any real estate broker, partial or otherwise, unless it shall appear to the satisfaction of the Commission that the real estate broker had guilty knowledge thereof.

Sec. 17. Be it further enacted, That a non-resident of this State may become a real estate broker or a real estate salesman by conforming to all of the conditions of this paragraph and this Act. Every non-resident applicant shall file an irrevocable consent that suits and actions may be com-

**Non-resident
Application**

menced against such applicant in the proper Court of any County of this State in which a cause of action may arise in which the plaintiff may reside, by the service of any process or pleadings authorized by the laws of this State, on the Secretary of the Commission; said consent stipulating and agreeing that such service of such process or pleadings on said Secretary, shall be taken, and held, in all courts to be as valid and binding as if due service had been made upon said applicant in the State of Tennessee. Said instrument containing such consent shall be authenticated by the seal thereof, if a corporation, or by the acknowledged signature of a member or officer thereof; if otherwise all such applications, except from individuals, shall be accompanied by the duly certified copy of the resolution of the proper officers or managing board authorizing the proper officer to execute same. In case any process or pleadings mentioned in this Act are served upon the Secretary of the Commission, it shall be by duplicate copies, one of which, shall be filed in the office of the Commission, and the other, immediately forwarded by registered mail to the main office of the applicant against which said process or pleadings are directed.

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at of

Sec. 18. Be it further enacted, That the Commission shall at least semi-annually publish a list of the names and addresses of all licensee licensed by it under the provisions of this Act, and of all persons whose license has been suspended or revoked within one year, together with such other information relative to the enforcement of the pro-

visions of this Act as it may deem of interest to the public. One of such lists shall be mailed to the County Court Clerk in each County, of the State, and shall be held by said County Clerk as a public record. Such lists shall also be mailed by the Commission to any person in the State upon request.

Sec. 19. Be it further enacted, That should the Courts declare any section or provision of this Act unconstitutional, such decision shall effect only the section or provision so declared to be unconstitutional, and shall not effect any other section or part of this Act.

Sec. 20. Be it further enacted, That any person, firm, partnership, association, co-partnership or corporation violating the provisions of this Act shall upon conviction thereof, be fined by a fine of not less than \$25.00 nor more than \$100.00.

**Violations,
Penalty**

Sec. 21. Be it further enacted, That all laws or parts of laws in conflict with this Act, be and the same are hereby repealed and that this Act take effect from and after its passage, the public welfare requiring it.

Passed April 4, 1921.

ANDREW L. TODD,
Speaker of the House of Representatives.

W. W. BOND,
Speaker of the Senate.

Approved April 6, 1921.

A. A. TAYLOR, *Governor.*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1922

R. W. Bratton, Ernest Adams, and John
F. Brownlow, etc., et al.,
Appellants,

vs.

No. 239

William C. Chandler and James E. Walden,
Individually and as Co-Partners Under
the Firm Name and Style of Chandler
& Walden, et al.,
Appellees.

BRIEF AND ARGUMENT ON BEHALF OF
APPELLEES

May It Please the Court:

This suit was instituted by the appellees William C. Chandler and James E. Walden, individually and as co-partners and some thirty-five (35) others, all of whom were real estate salesmen and brokers, against the appellants, R. W. Bratton, Ernest Adams, and John F. Brownlow, constituting the

Tennessee Real Estate Commission, and the Attorney General of Shelby County, Tennessee, (the official charged with the duty of the enforcement of the statute) assailing as unconstitutional and invalid the Tennessee Legislative Act of 1921, Chapter 98 (House Bill No. 623) entitled "An Act to define, regulate and license real estate brokers and real estate salesmen, to create a State Real Estate Commission, and to provide a penalty for the violation of the provisions thereof," under which act the defendant commissioners were appointed. The constitutionality of the act was assailed upon numerous grounds (See original Bill of Complaint, Tr. pp. 4-14; Amendment to Bill of Complaint, Tr. pp. 25-27).

The cause was heard in the District Court before their Honors, Circuit Judge Donahue and District Judges Sanford and Ross, the act held unconstitutional and void and the prayer of the bill for an injunction granted, and the injunction as prayed for ordered issued (Tr. pp. 40-41). From that decree the defendants prayed and perfected their appeal (Tr. pp. 53-54).

The act in question is set forth in full in the Transcript of Record (Tr. pp. 25-36). The opinion of the Court was, by consent made a part of the record in the cause (Tr. p. 41), and is set forth in full (Tr. pp. 43-53).

The statute undertook to regulate the private business of real estate brokers and real estate salesmen and created a body styled the Tennessee Real Estate Commission.

Section 1 of the Act makes it "unlawful for any person, firm, association or co-partnership . . . to engage in the business, or capacity, either directly or indirectly, of a real estate broker, or real estate salesman . . . without first obtaining a license under the provisions of this Act.

License shall be granted only to persons who are trust-worthy and bear a good reputation for honesty and fair dealing, and are competent to transact the business of a real estate broker or real estate salesman, in such manner as to safeguard the interests of the public, and only after satisfactory proof has been presented to the commission."

Section 2 enacts "That a real estate broker within the meaning of this Act, is any person, firm, partnership, association, co-partnership or corporation, who for a compensation or valuable consideration engaging in the business, buys or offers to buy, or negotiate the purchase or sale or exchange of real estate, or who leases, or offers to lease, or rents or offers for rent any real estate or the improvements thereon for others as a whole or partial vocation.

A real estate salesman, within the meaning of this Act, is any person who for a compensation or valuable consideration is employed either directly or indirectly by a licensed real estate broker to sell or to offer to sell or buy or offer to buy, or negotiate the purchase or sale or exchange of real estate or lease or offer to lease, rent or offer to rent any real estate for others as a whole or partial vocation.

The provisions of this Act shall not apply to any person, firm, partnership, association, co-partnership or corporation who as owner or lessor, shall perform any of the acts aforesaid, with reference to property owned by them, *nor*

shall the provisions of this Act apply to persons holding a duly executed power of attorney from the owner for the sale, leasing or exchange of real estate." (Italics ours.)

Section 4 creates "The Tennessee Real Estate Commission," provides for the appointment of the members, their tenure of office; their organization and compensation, and then enacts that "The Commission * * * may do all things necessary and convenient for carrying into effect the provisions of this Act and may from time to time promulgate necessary rules and regulations." It further makes provisions for fees, charges and expenses and other incidental matters.

Section 8 enacts:

"That all applications for license shall be made in writing to the Commission. Such application shall also be accompanied by the recommendation of at least two citizens, real estate owners, not related to the applicant, who have owned real estate for a period of one year or more in the county in which said applicant resides, or has his place of business, which recommendation shall certify that the applicant bears a good reputation for honesty, competency and fair dealing, and recommending that a license be granted to the applicant. Every applicant for a license shall furnish a sworn statement setting forth his present address, both of business and residence, the complete address of all former places where he may have resided or been engaged in business, or acted as a real estate salesman, for a period of sixty days or more, during the last five years, and the length of such

residence, together with the name of at least one real estate owner in each of the said counties where he may have resided, engaged in business, or acted as a salesman. Every applicant for a broker's license shall also state the name of the person, firm, partnership, co-partnership or corporation, and the location of the place, or places, for which said license is desired, and set forth the period of time, if any, which said applicant has been engaged in the business, and shall be executed by such person, or by an officer or member thereof. Every real estate broker maintains more than one place of business within this state, and duplicate license shall be issued to such broker for each branch office as maintained. Each duplicate license shall be issued without additional charge. Every applicant for a salesman's license, shall, in addition to the requirements of the first paragraph of this section, also set forth the period of time, if any, during which he has been engaged in the business, stating the name of his last employer, and the name of the place of business of the person, firm, partnership, co-partnership or corporation then employing him, or in whose employ he is to enter. The application shall be accompanied by a written statement by the broker in whose employ he is to enter, stating that in his opinion, the applicant is honest, truthful and of good reputation, recommending that the license be granted to the applicant. The Commission shall have the right to prescribe the form of application for all license. *The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker's license or salesman's license, or any of*

the officers or members of any such applicant, prior to the issuance of any such license. (Italics ours.) The Commission is expressly vested with the power and authority to make, prescribe and enforce any, and all, such rules and regulations connected with the application of any license, as shall be deemed necessary to administer and enforce the provisions of this Act.”
(Tr. pp. 30-31.) (Italics ours.)

Further provisions of the Act deal with the form of license and conspicuous display thereof in the place of business, change of address, issuance of the “Pocket Card” to the licensee (evidently the memory of the Draft Legislation was fresh in the minds of the legislators), the discharge of real estate salesmen by the broker or his change of employment, the surrender of his license, the re-issuance of a license, the fees to be paid by the licensees; the term, expiration and renewal of licenses; the bond to be executed by the licensee and the suspension and revocation of licenses. In connection with this last phase the Act prescribes specifically the procedure, Sec. 15 thereof being as follows:

“Be it further enacted, That the Commission shall, before suspending or revoking any license and at least ten days prior to the date set for the hearing, notify in writing, the holder of such license of any charge made, and shall afford said licensee an opportunity to be heard in person or by counsel in reference thereto. Such written notice may be served by delivery of same, personally, to the licensee or by mailing same, by registered mail, to the last known business address of such licensee. If said licensee be a salesman, the Commission shall also

notify the broker employing him, of the charges, by mailing notice by registered mail to the broker's last known address. The hearing on such charges shall be at such time and place as the Commission shall prescribe. The Commission shall have the power to subpoena and bring before it any person in this state or take testimony of any such person by deposition, with the same fees and mileage in the same manner as prescribed by law in judicial procedure in courts of this state in civil cases. If the Commission shall determine that any licensee is guilty of a violation of any of the provisions of this Act, said licensee shall be suspended or revoked. The findings of this fact made by the Commission, acting within its power, shall in the absence of fraud be conclusive, but the Supreme Court shall have the power to review questions of law involved in the final decision or determination of the Commission; provided that application is made by the aggrieved party within thirty days after such determination, by certiorari, mandamus or by any other method permissible under the rules and practices of said Court or the laws of this state, and to make such further orders in respect thereto as justice may require."

Section 18 provides for the publication annually of the names and addresses of all licensees, and is as follows:

"Be it further enacted, That the Commission shall at least semi-annually publish a list of the names and addresses of all licensees, licensed by it under the provisions of this Act, and of all persons whose license has been suspended or revoked within one year, together with such other information relative to the en-

forcement of the provisions of this Act, as it may deem of interest to the public. One of such lists shall be mailed to the County Court Clerk in each county of the state, and shall be held by the County Clerk as a public record. Such lists shall also be mailed by the Commission to any person in the state upon request."

The remaining material provisions of the statute are as follows:

"Sec. 19. Be it further enacted, That, should the courts declare any section or provision of this Act unconstitutional, such decision shall affect only the section or provision so declared to be unconstitutional, and shall not affect any other section or part of this Act.

Sec. 20. Be it further enacted, That any person, firm, partnership, association, co-partnership or corporation violating the provisions of this Act shall upon conviction thereof, be fined by a fine of not less than \$25.00 nor more than \$100.00."

The Act, as will be evidenced by its perusal, vests in the Commission unbridled and uncontrolled discretionary powers and authority. Those are severe and drastic. They kindle the ire.

BRIEF**I.**

A. The statute is violative of the due process provisions of the Fourteenth Amendment to the Constitution of the United States, because it fails to provide for notice or hearing, and does not provide for stated meetings of the Commission at specified times and fixed place.

See Opinion of Judges, Tr. p. 51;

Coe v. Fertilizer Works, 237 U. S. 413, 424;

Security Trust & S. B. Co. v. Lexington, 203 U. S. 323, 333; 51 L. Ed. 204, 208;

R. Co. v. Minnesota, 134 U. S. 408, 457;

Paulson v. Portland, 149 U. S. 30-41;

Gen. R. Co. of Ga. v. Wright, 207 U. S. 127-138;

R. Co. v. Stock Yards Co., 212 U. S. 132, 144;

Truax v. Raich, 239 U. S. 33;

Stuart v. Palmer, 74 N. Y. 183, 188;

Connors v. City of Knoxville, 136 Tenn. 428;

State v. Turnpike Co., 131 Tenn. 604.

This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace.

Coe v. Fertilizer Works, *supra*;

Security Tr. & S. B. Co. v. Lexington, *supra*;

R. Co. v. Wright, *supra*;

Roller v. Holly, 176 U. S. 398, 409; 44 L. Ed. 520, 524;

Van Tuyl v. Carpenter, 135 Tenn. 629;

Mott v. Georgia State Board of Examiners, 95 S. E. 667;

The fundamental requisite of due process of law is the opportunity to be heard.

Grannis v. Ordean, 234 U. S. 385, 394; 58 L. Ed. 1361, 1369;

Louisville & Nashville R. Co. v. Schmidt, 177 U. S. 230, 236; 44 L. Ed. 757, 750;

Simon v. Craft, 182 U. S. 427, 436; 45 L. Ed. 1165, 1170;

The additional requisite of due process of law is that it shall be "a law which hears before it condemns."

Taylor, Due Process of Law, p. 275;

McGehee, Due Process of Law, pp. 49-51;

Guthrie, The Fourteenth Amendment, pp. 69-70;

Cooley, Const. Lim., p. 502;

R. Co. v. Minn., 1344 U. S. 418; 33 L. Ed. 970, 980;

Scott v. McNeal, 154 U. S. 34;

State v. Turnpike Co., 131 Tenn. 604.

B. It does not suffice that there is provision for judicial review, nor does it suffice that there is a right to judicial review, unless such right to a judicial review be substantial, adequate and safely available.

Wadley S. R. Co. v. Georgia, 235 U. S. 651, 661; 59 L. Ed. 405, 411.

Assuming that the applicant for license, may as a matter of right by writ of certiorari, review the

action of the commission, nevertheless, such proceeding does not afford an adequate remedy.

Conners v. City of Knoxville, 136 Tenn. 428, 434.

This alleged right of review by certiorari is "merely nominal and illusory" because the applicant affected is, pending a determination of the writ of certiorari, deprived of the right to pursue his vocation, without having had an opportunity to be heard.

Conners v. City of Knoxville, *supra*;

Wadley S. R. Co. v. Georgia, 235 U. S. 405, 641, 6-668;

Cotting v. K. C. Stock Yards Co., 183 U. S. 101; 46 L. Ed. 105.

In determining the constitutionality and validity of rate-making legislation, this court has carefully pointed out the distinction between those statutes on the one hand which impose cumulative penalties only after there has been a final determination of the validity of the statute, and, on the other hand, those which in terms or by the operation of deterrent penalties make the statute or the order of the commission conclusive as to the sufficiency of rates. The former are held to be constitutional; the latter, unconstitutional.

Wadley S. R. Co. v. Georgia, *supra*;

Cotting v. K. C. Stock Yards Co., *supra*;

Ex Parte Young, 209 U. S. 123; 53 L. Ed. 714;

Simpson v. Shephard, 230 U. S. 472, 473; 57 L. Ed. 1570, 1571.

C. The Act, Section 8, authorizes the Commission "to require and procure any and all satisfactory proof, as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant * * * prior to the issuance of any such license."

This provision authorizes the commission "to obtain ex parte evidence at will, without notice and hearing to the applicant."

Opinion of Judges, Tr. p. 52.

The meagerness and viciousness of the statute with regard to applications for an issuance of licenses is in marked contrast to the minuteness of the provisions for the revocation of a license.

See Section 8, Tr. p. 30;

Section 15, Tr. p. 34.

D. Nor is there any warrant for the interpolation of words so that it shall read as set forth in appellants' Fourth Assignment of Error, viz.: "that the commission is authorized *to require of the applicant* and procure of him through such requirements, such additional evidence," etc. (Tr. p. 68) because:

(a) There is no authority in the court to insert a word in the statute in order to change its meaning.

Newhall v. Sanger, 92 U. S. 761; 23 L. Ed. 769;

Lewis' Suth. Stat. Const. (2nd Ed.) Vol. 2, p. 798, Sec. 411.

(b) The Section (8) in question put no limitation upon the sources of proof which the commission

might "require and procure." The law is expressed in plain and unambiguous terms. The intent is plain. There is no room left for construction.

U. S. v. Lexington Mill & Elevator Co., 232
U. S. 399, 409; 58 L. Ed. 658, 662.

The power to require and procure satisfactory proof being expressed in plain and unambiguous language, the only duty of the court is to give it effect according to those terms.

Lake County v. Rollins, 130 U. S. 662, 670;
32 L. Ed. 1060, 1063;

Hamilton v. Rathbone, 175 U. S. 414, 421; 44
L. Ed. 219, 222.

Had the legislature intended to enact the statute so as to read in the form as urged by appellants in their assignment of error IV, Tr. p. 56, viz.: "to require *the applicant* and to procure of him through such requirements any and all satisfactory proof," it would have done so by the choice of apt words to express that intent.

U. S. v. Lexington Mill & Elevator Co., 232
U. S. 410.

The proposed effect is sought to be attained by inserting words that are not there, and limiting the statute in the manner which appellants seek would be to make a new law, not to enforce an old one. This is no part of the duty of the court.

U. S. v. Reese, 92 U. S. 214; 23 L. Ed. 563;
Hill v. Wallace, --- U. S. Rep. ---; 66 L.
Ed. ---; U. S. Sup. Ct. Adv. Op., June 15,
1922, p. 527.

E. Section 8 is so closely related to the valid sections that without it they could serve no purpose within the contemplation of the legislature, and therefore the entire statute must be held inoperative.

Opinion Judges, Tr. p. 53.

Connolly v. Union Sewer Pipe Co., 184 U. S. 565;

Weaver v. Davidson Co., 104 Tenn. 315.

Section 19 of the statute did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain.

Hill v. Wallace, *supra*.

The power to require and procure evidence of and in itself is one which the legislature may properly vest in the commission and is innocuous but its presence renders the Act unconstitutional because it may be used in conjunction with the determination of the right of the applicant to his license and the power may be executed without there being any notice given or a hearing had.

The constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done.

Stuart v. Palmer, 74 N. Y. 183; 30 Am. Rep. 290;

Schmidt v. Railroad Co., 177 U. S. 230, 236; 44 L. Ed. 747, 750;

Yick Wo. v. Hopkins, 118 U. S. 336.

II.

The Act unreasonably discriminates against those real estate agents who cannot secure the recommendations and certificates of character from citizens of the county who

- (1) is a real estate owner,
- (2) owns land in the particular county,
- (3) has owned the land for more than a year.

(Statute, Sec. 8, Tr. p. 30.)

This is an unreasonable discrimination because it bears no relation to the competency or qualifications of the agent to follow his particular line of business.

Smith v. Texas, 233 U. S. 630; 58 L. Ed. 1129.

III.

The statute is discriminatory and denies the equal protection of the laws because it is made applicable to all those "who engage in the business or capacity of real estate broker or real estate salesman" and at the same time exempts therefrom "persons holding a duly executed power of attorney" from the owner for the sale, leasing or exchange of real estate.

Secs. 1-2, Tr. p. 28.

The Act Operates Unequally

The statute relating to persons or things as a class is a general law. One relating to particular persons or things of a class is a special law.

Wheeler v. Philadelphia, 77 Pa. State 838.

The act thus divides a natural class; that is, those engaged in business as real estate salesmen or real estate brokers, into two groups: (a) those acting with, and (b) those acting without,—“a duly executed power of attorney,” and in effect arbitrarily enacts different rules for the government of each.

- Connolly v. Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679;
- Cotting v. Kansas City Stock Yards Co., 183 U. S. 79; 46 L. Ed. 92;
- State v. Gravette, 65 Ohio St. 289; 55 L. R. A. 791; 87 A. S. R. 605;
- Hager v. Walker, 128 Ky. 21; 15 L. R. A. N. S. 195;
- Harper v. Galloway, 58 Fla. 255; 19 Ann. Cas. 235;
- State v. Mallory, 73 Ark. 236; 3 Ann. Cas. 852; 67 L. R. A. 773; 83 S. W. R. 995;
- Wolley v. Mears, 226 Mo. 41; 136 A. S. R. 837;
- Grossman v. Kanisch, 79 N. Y. App. Div. 15;
- Cody v. Dempsey, 86 N. Y. App. Div. 335;
- State v. Walsh, 136 Mo. 400; 37 S. W. 1116; 35 L. R. A. 231;
- Bessette v. People, 186 Ill. 334; 55 L. R. A. 558, 563;
- Bailey v. People, 199 Ill. 28; 54 L. R. A. 828;
- State v. Julow, 129 No. 163; 30 A. S. R. 443; 29 L. R. A. 257;
- Ex Parte Sohneke, 148 Cal. 479; 2 L. R. A. (N. S.) 816; 7 Am. Ann. Cas. 475; 113 A. S. R. 236; 82 Pac. 956.

The Act declares those who engage in this business to be criminal if they do so without a license. It exempts from its operation those who may equip themselves with "a scrap of paper" labeled "duly executed power of attorney," and permits them to do that which if done by others would be a crime against the state.

Connolly v. Union Sewer Pipe Co., *supra*.

The Judges held that "an attempt may be made to defeat the purpose of this law" by resorting to a power of attorney, but in that event, said the Judges, the legislature will probably amend this Act and repeal the exemption.

Tr. p. 49.

The constitutionality of a statute is to be tested not by what has been done under it, but what may by its authority be done.

Stuart v. Palmer, *supra*;

Schmidt v. R. Co., 177 U. S. 230, 236;

Yick Wo. v. Hopkins, 118 U. S. 336.

The force of the contention that the statute is discriminatory and denies the equal protection of the law was recognized, but in order to save the statute, the court construed the Act as meaning, "written authority to act for and in place of a principal in consummating the transaction, as distinguished from merely negotiating it."

Riley v. Chambers, 181 Calif. 589; 8 A. L. R. 418, 424.

Such limitation upon the scope of a power of attorney is not to be found in the language of the Act, which is expressed in plain and unambiguous terms and is to be given effect according to those terms.

Authorities cited—D, *supra*.

Had the legislature intended to restrict the exemption to those holding powers of attorney which authorized the consummation as well as the negotiation of the transaction "it would have done so by the choice of apt words to express that intent."

U. S. v. Lexington Mill & Elevator Co., *supra*.

ARGUMENT

The original bill of complaint and its amendment assail the statute in question as unconstitutional on numerous grounds, but only two of those are now insisted upon and argued; those are as follows:

I. The statute is violative of the due process provisions of the Fourteenth Amendment to the Constitution of the United States, because it fails to provide for notice or hearing; nor does it provide for stated meetings of the Commission at specified times or place.

II. The statute operates unequally. It is discriminatory and denies the equal protection of the laws, because it is made applicable to all those "who engage in the business or capacity of real estate brokers or real estate salesmen," and at the same time exempts therefrom "persons holding a duly executed power of attorney from the owner for the sale, leasing or exchange of real estate."

I.

The statute deprives those who are now engaged in the business of a real estate broker or real estate salesman, or both, and who, if this act is valid, will become applicants for licenses, of their property without due process of law, because it requires that they shall apply for and procure a license from the Commission created by the statute, upon forms prescribed by it, or to be prescribed by the Commission, and authorizes the Commission thereafter

". . . to require and procure any and all satisfactory proof as shall be deemed desirable

in reference to the honesty, truthfulness, reputation and competency of any applicant . . . prior to the issuance of any such license" (Stat., Section 8, Tr. p. 31),

and which license, in the discretion of the Commission, may be granted or refused, but the statute nowhere provides for notice to the applicant of a hearing upon his application, nor does the statute provide for stated meetings of the Commission at specified times and fixed place or places; nor does it assure to the applicant an opportunity to be heard, though the disposition of his application may be as stated above, upon such "satisfactory proof as shall be deemed desirable," and which the Commission may "require and procure" prior to the issuance of any license, and of which proof, so required and procured, the applicant may be totally unaware and have no opportunity to confront or rebut.

Text writers and courts, with practical unanimity, approve Mr. Webster's famous definition of due process of law, that is:

"By the law of the land is most clearly intended the general law; *a law which hears before it condemns*; it proceeds upon inquiry and renders judgment only after trial."

Taylor, Due Process of Law, p. 275;
 McGehee, Due Process of Law, pp. 49-51;
 Willoughby, Constitution, p. 858;
 Story, Constitution, Vol. 2, p. 694;
 Cooley, Const. Lim., p. 502;
 Guthrie, The Fourteenth Amendment, pp. 69-70;

- Chicago, etc., *R. R. Co. v. Minnesota*, 134 U. S., pp. 418, 457; 33 L. Ed., 970, 980;
Stuart v. Palmer, 74 N. Y., 183, 138; 30 Am. Rep. 190, 204;
State v. Del Rio Turnpike Co., 131 Tenn. 604;
Fertilizer Co. v. McCall, 128 Tenn. 657, 654;
Van Tuyl v. Carpenter, 135 Tenn. 629;
Mott v. Georgia State Board of Examiners, 95 S. E. 667;
Scott v. McNeal, 154 U. S. 34;

The law requires a hearing before condemnation, and judgment before dispossession.

- Van Zandt v. Waddell*, 2 Yerger 260;
Pennoyer v. Neff, 95 U. S. 714;
Ferry v. Campbell, 110 Iowa 290;
 50 L. R. A. 92; 84 N. W. 604;
Cooley, Const. Lim., 500, 506.

In explaining the meaning of the words, "the law of the land," the foremost commentator on *Magna Charta* has said: "Its main object (Chap. 39) was to prohibit John from resorting to what is sometimes whimsically known in Scotland as 'Jeddart Justice.' It forbade him for the future to place execution before judgment."

Taylor, Due Process of Law, Sec. 100, p. 190.

"The applicant's rights are passed upon and judgment given without a trial, without witnesses, without a jury, in secret, without any of the forms common to courts of justice, without the privilege of appearing," in person or by counsel.

- State vs. Turnpike Co.*, 131 Tenn. 603;
White, etc., Turnpike Co. vs. Marshall, 61 Tenn. 104, 113.

The statute does not provide for or require notice or hearing on the application.

It authorizes and empowers the Commission to require and procure any and all satisfactory proof as shall be deemed desirable.

The statute puts no limit or restriction upon the power of the Commission. Yet under its authorization, the Commission may wander far afield in its search for evidence. How long it will search, or when it will conclude its investigation and finally determine the right of the applicant to a license, is a matter that lies wholly within the discretion of the Commission. This statute has not the saving grace of the statute that was upheld in the case of *Reetz v. People of Michigan*, 188 U. S. 505; 47 L. Ed. 563, which was upheld because, as this Court said:

“The statute provides for semi-annual meetings at specified times at the State Capitol.”

It is admitted that where the statute fixes the time and place of the holding of sessions or meetings of the Commission, and there is no obstruction to the appearance of anyone before it to assert a right or redress a wrong, there is no further notice required.

State Railroad Tax Case, 92 U. S. 575;
Reetz v. People, supra;
Tomlinson v. State, 88 Tenn. 5;
Bi-Metallic Investment Co. v. State Board of Equalization, 239 U. S. 441; 60 L. Ed. 373.

B. The authorities are practically unanimous in holding that a statute of this character that fails to

provide for notice and hearing, or for judicial review, violates the due process provisions of the Fourteenth Amendment to the Constitution of the United States.

- See Opinion of Judges, Tr. 51;
 Paulsen v. Portland, 149 U. S. 30-41;
 Truax v. Raich, 239 U. S. 33;
 Security Trust Co. v. Lexington, 203 U. S. 323-333;
 Railroad v. Minnesota, 134 U. S. 418, 457;
 Central Ry. v. Wright, 207 U. S. 127-138;
 Railroad Co. v. Stock Yards Co., 212 U. S. 132-144;
 Coe v. Fertilizer Works, 237 U. S. 413-424;
 Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287;
 Stuart v. Palmer, 74 N. Y. 183, 188;
 State v. Turnpike Co., 131 Tenn. 604.

Those authorities may well be grouped into two distinct classes, viz:

(a) Those in which the statute or act challenged deprived the person in the beginning of property or liberty, the injury caused by such deprivation being irreparable.

In this class of cases notice must precede any action whatsoever.

- State v. Turnpike Co., 131 Tenn. 604;
 Hayden v. Memphis, 100 Tenn. 582;
 Conner v. City of Knoxville, 136 Tenn. 429;
 Reetz v. Michigan, 188 U. S. 505;
 Coe v. Fertilizer Co., *supra*;
 Wadley S. R. Co. v. Georgia, 235 U. S. 651, 661; 59 L. Ed. 405, 411.

(b) Those in which the statute or the act challenged deprived the persons *ultimately* of property or liberty, in which event judicial review at some stage of the proceeding may suffice to remedy the omission, or failure to provide for notice or hearing in the beginning.

McMillan v. Anderson, 95 U. S. 37; 24 L. Ed. 335;

Hagar v. Reclamation District, 111 U. S. 701;

Palmer v. McMahon, 133 U. S. 660;

O'Neil v. Irrigation Co., 242 U. S. 20.

(All cited by opponents.)

All of those cases involve the collection and payment of a tax; in none of them was there a forfeiture or deprivation of property until after an opportunity had been afforded for a hearing or judicial review. Regardless of how long the litigation was protracted, the taxpayer was not prejudiced, because until it was finally determined his property was not seized. Even if there had been an attempt to seize the property at the very inception of the controversy, nevertheless by injunctive process or some other equitable proceeding the sale or disposition of the property would be restrained until a final determination of the litigation. The taxpayer would avoid a forfeiture and loss. But in the instant case and cases of similar nature where the action of the Commission or of any other body deprived a person of the right to pursue a vocation, or of the power to assert any right, the denial of which would result in irreparable injury, it must follow that a notice must inevitably and invariably precede the action of the Commission or other body.

In the instant case the applicant, upon evidence which the Commission may "require and procure," and of which he may be totally unaware, may be deprived of the right to pursue his vocation and be penalized and branded as a criminal if he does so without a license, without notice or opportunity to be heard.

C. Even though it be assumed that other statutes of the state assure to him a judicial review, and afford him an adequate remedy (which is not so, 136 Tenn. 430), nevertheless he is, by reason of the denial of a license, deprived of the right to pursue his vocation during the pendency of judicial review.

All the while that he is seeking a judicial review he is not "licensed" to engage in the business of a real estate broker or real estate salesman. Ultimate success of the prosecution of his judicial review can not restore to him loss of time and lost opportunity. His loss is an irreparable one. No one must respond to him in damages for the wrongful denial of a license, because the Commission sits as a quasi-judicial body, nor is there any means of admeasuring the damage which he will sustain, if anyone could be required to answer unto him for such damage. So in every aspect of the case his loss is an irreparable one.

The loss ensues because of the want of notice or of hearing.

Assuming that the applicant is entitled to judicial review, nevertheless such remedy must be substantial, adequate and safely available.

Wadley S. R. Co. v. Georgia, 235 U. S. 651;

Cotting v. Kansas City Stock Yards Co., 183 U. S. 101; 46 L. Ed. 105.

“In Cotting v. Kansas City Stock Yards Co., Justice Brewer has pointed out that there might be a distinction between punishing for acts done before and for those done after the validity of the rate statute had been settled, saying:

‘It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme or cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented.’ ” (235 U. S. 667-668.)

That case emphasizes the distinction made between those cases in which there is a taking or deprivation of rights or of property before a hearing, and those in which a judicial review does not afford a substantial, adequate and safely available remedy.

The fundamental idea of due process of law is, “*A law which hears before it condemns.*”

So where the statute of the State of Tennessee provided for superintendents “to look over the turnpike roads and toll bridges in the county, and see that they are kept in repair as required by law,” and that “Whenever in the opinion of the majority of said superintendents any road or bridge shall manifestly be in bad condition, they may open the gates of said public way until it is put in good order and condition,” and made it a punishable offense for the owner of the pike or bridge to demand

or receive toll during the time that either is closed, it was held that the statute deprived the owner of his property without due process of law, because of the absence of any provision for notice or hearing.

In answer to the contention that the owners would have a right, "not given in terms" or on terms by the statute in question, to resort to a court of equity for an injunction, and to there test the lawfulness of the superintendents' action in opening the gates, the Supreme Court of Tennessee said:

"It yet remains a fact that the Company would stand to lose the revenue that would have been collectible by it pending the litigation or the court's permission to lower the gates." * * *.

"The suspension of the right to take toll under similar statutes, without precedent notice and hearing, is a violation of the due process of law and the 'law of the land' constitutional provisions. *Powell v. Sammons*, 31 Ala. 552; *Ohio Turnpike Co. v. Waechter*, 25 Ohio Cir. Ct. Re. 605. *State v. Turnpike Co.*, 131 Tenn. 600, 602, 609, 610."

Nor does the giving of a notice as a favor cure a statute that fails to provide for such notice.

Coe v. Armour Fertilizer Works, 237 U. S. 413-424;

Security Trust Co. v. Lexington, 203 U. S. 323-333;

Railroad Co. v. Wright, 207 U. S. 127-138;

Roller v. Holly, 176 U. S. 398-409;

Windsor v. McVeigh, 93 U. S. 274-279;

Grannis v. Ordean, 234 U. S. 385-393.

In this connection we quote from the language of this Court in the recent case of *Coe v. Fertilizer Works*, supra, as follows:

“Nor can extra official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart v. Palmer*, 74 N. Y. 83, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited but without notice to the owner, the Court said: ‘It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity (425) to be heard.’ The soundness of this doctrine has repeatedly been recognized by this Court. Thus, in *Security Trust & S. B. Co. v. Lexington*, 203 U. S. 323, 333, 51 L. Ed. 204, 208, 27 Sup. Ct. Rep. 87, the Court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: ‘If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute’ (citing the New York case). So, in *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 138, 52 L. Ed. 134, 141, 28 Sup. Ct. Rep. 47, the Court said: ‘This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.’ In *Roller v. Holly*, 176 U. S. 308, 409, 4 L. Ed. 520, 524, 20 Sup.

Ct. Rep. 410, the Court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the court as such.' "

This act authorized the Commission not only to require the furnishing of further evidence, but also to procure, independently, any and all satisfactory proof it may deem desirable in reference to the honesty, truthfulness, reputation and competency of any applicant (Sec. 8). The statute makes no provision whatsoever for notice or opportunity to meet this evidence procured by the Commission, nor does it even require that the applicant shall be advised of the nature or the source of the evidence procured by the Commission upon which it may refuse to issue a license. See Opinion of Judges, Tr. p. 51.

D. The supposed remedy, by writ of certiorari, does not supply the failure or omission to give notice in advance of the action upon the application.

(a) The applicant is entitled in the first instance to a hearing before the Commission, which is the tribunal created by the statute to pass upon application for license.

(b) If the application be disposed of upon evidence which the Commission has gathered, under the power conferred upon it, and by which the ap-

plicant under the statute is not entitled to have notice, then truly this is a law which condemns first and remits an applicant to another statute for a hearing thereafter.

(c) The applicant is remitted to the statutory writ of certiorari, no provision for judicial review being incorporated in the statute.

“Certiorari lies: (1) On suggestion of diminution; (2) where no appeal is given; (3) as a substitute for appeal; (4) instead of audita querela; (5) instead of writ of error.”

Shan. Code of Tenn., Sec. 4854;

Code of Tenn., Sec. 3124.

(d) “Suits brought into an appellate court by writ of certiorari shall be triable at the return of the writ.”

Acts of Tenn. 1903, Chap. 115, Sec. 1.

Shannon’s Code, Sec. 4866-a-1.

(e) The hearing of such writ is subject to postponement by the court.

Scovell v. Nashville, 2 Shan. Cas. 260.

(f) The right to a judicial review must be substantial, adequate and safely available.

Wadley So. Ry. Co. v. Georgia, 235 U. S. 651, 661.

But that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality than to ask for the protection of the law. (Ibid.)

(g) The Tennessee statute providing for certiorari does not afford an adequate remedy.

Connors v. City of Knoxville, 136 Tenn. 428-434.

In the latter case the Supreme Court of Tennessee said:

“The statute specifically and affirmatively provides that *certiorari* lies ‘where no appeal is given,’ but *it does not stipulate* that provision for an appeal shall, in all cases, be deemed *an adequate remedy*, binding or restraining ‘the judgment of the court’ as to its being a speedy and adequate remedy in cases where an ‘inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally.’ ”

Furthermore, the practical operation of this remedy is tersely stated by the Supreme Court in the same case as follows:

“An appeal with a consequent trial de novo would deprive him of his right to have notice, and a trial before the board in respect to the existence of cause under charges preferred before that tribunal. He might have demonstrated there that no cause for removal existed. Let us assume that an appeal would have availed to give him one trial in the circuit court. He was entitled to two. And what, on appeal, of his right to notice in advance of any hearing; and who in the circuit court is to formulate the charges against him for the first time?” (136 Tenn. 438.)

It is clear that the supposed remedy of certiorari afforded by other Tennessee statutes cannot supply the absence in the statute of the provision for notice before hearing, or for an opportunity to be heard.

II.

This act makes an unreasonable discrimination against applicants who cannot secure a recommendation of two citizen real estate owners who have owned real estate in the county of the applicant's residence or business for one year or more. Such an application, signed by two real estate owners who have owned their real estate in the particular county for more than a year, is the first condition of obtaining the license, which license is required to permit the agent to earn his living in the vocation which he has adopted. Section 8 of the act provides:

“That all applications for license shall be made in writing to the Commission. Such applications shall also be accompanied by the recommendation of at least two citizens, real estate owners, not related to the applicant, who have owned real estate for a period of one year or more in the county in which the applicant resides, or has his place of business, which recommendations shall certify that the applicant bears good reputation for honesty, competency and fair dealing and recommending that a license be granted to the applicant.”

It, therefore, follows that it is not sufficient for the applicant to bear a good reputation for honesty,

competency and fair dealing, and is not sufficient for him to prove it by any witness, but that he must first secure this proof and, in addition to this proof, a recommendation from two citizen real estate owners who are not related to him, and not only two citizen real estate owners, but those who have owned real estate in the particular county for more than a year. In other words, not only his proof of good reputation and honesty, but his recommendation (without which he cannot continue to pursue his business of making a living) is confined to a restricted class of citizens holding property, that property restricted to real estate, but further restricted by being real estate in the particular county, and such real estate must have been owned for more than a year. A perfectly worthy and competent applicant may be denied the right to continue in his chosen business, although able to prove his competency and secure recommendations, unless the recommendations he secures and the proof he makes can be made, not only by the restricted and presumably aristocratic class of land owners, but land owners who own land and are citizens of the particular county and who are not related to him, and land owners who have owned land in that particular county for more than one year. If he can secure the proof and recommendations of property holders and even land owners not related to him, he cannot secure his license if he is unable to secure the proof and recommendation from land owners in that particular county and, worse still, who have not been land owners in that county for more than one year. There is no reason in the discrimination. Proof is

just as good and recommendations are just as good if made by others than land owners and if made by land owners owning land in other counties in the state, and especially if made by citizens of the particular county who are land owners but have owned their lands for only six or eleven months. This discrimination is opposed by the principle announced by the Supreme Court in the case of *Smith v. State of Texas*, 233 U. S. 630, 58 L. Ed. 1129.

III.

The statute is discriminatory and denies the equal protection of the laws because it is applicable to all those who "engage in the business or capacity, either directly or indirectly, of a real estate broker or a real estate salesman, without first obtaining a license under the provisions of this act." (Sec. 1, Tr. p. 28.)

On the other hand, it expressly provides that, "nor shall the provisions of this act apply to persons holding a duly executed power of attorney from the owner for the sale, leasing or exchange of real estate."

(a) The Act defines a "real estate broker" as any person, etc., "who for a compensation or valuable consideration engaging in the business, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate, or the leasing or offers to lease, or rents, or offers to rent any real estate, or the improvements thereon for others as a whole or partial vocation" (Sec. 2).

(b) The act defines a real estate salesman as "any person who for a compensation or valuable consideration" is employed either directly or indirectly by a licensed real estate broker to sell or offer to sell, or buy or offer to buy, or negotiate the purchase or sale or exchange of real estate, or lease or offer to lease, rent or offer to rent any real estate for others as a whole or partial vocation. (Ibid., Sec. 2.)

To constitute a real estate broker or a real estate salesman as defined in the act, it is sufficient that the person pursue any one of the different phases or branches of the business; it is unnecessary that he pursue all to constitute a broker or salesman within the meaning of this act; the act carefully uses the disjunctive in defining the terms.

Therefore, it follows that anyone who pursues any one of those branches "as a whole or partial vocation" comes within the purview of the act.

There is exempted from the provisions of the statute "persons holding a duly executed power of attorney" from the owner for the sale, leasing or exchange of real estate.

The requirements of duly executed power of attorney will be satisfied by any properly signed "scrap of paper." Those holding such power of attorney may, without license and with impunity, "for a compensation or valuable consideration" engage in the business as broker or salesman, and negotiate the sale, lease or exchange of real estate—these

being three of the attributes of the business for which a license is demanded of everyone save those holding such duly executed power of attorney.

The statute, therefore, declares that some of the classes engaging in this business as "a whole or partial vocation" shall be deemed criminals if they pursue the vocation without a license, while their neighbors, holding a duly executed power of attorney from the owner for the sale, leasing or exchange of real estate, may pursue such vocation with impunity.

It was legislation of this kind which denounced as a crime the formation of trusts and exempted from its operation agricultural products and live stock in the hands of the producer or raiser, that was held to be unconstitutional by this Honorable Court because it made an unreasonable discrimination and denied the equal protection of the laws to those who came within its purview.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 550-564.

The Court, among other things, said:

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class

shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

(46 L. Ed. 691, 692.)

In *Riley v. Chambers*, 181 Calif. 589, the Supreme Court of that state, in considering this contention, among other things said:

"The second objection of *amici curiae* along this line is that an unreasonable distinction is made when the act excepts 'persons holding a duly executed power of attorney from the owner.' The soundness of this objection depends upon what is meant by a 'power of attorney.' Power of attorney to do what? The act does not say. Any written authority by one man to act for another may be said to be a power of attorney, and the argument of *amici curiae* is that, as used in the act in question, it must include authority to act as broker merely, to negotiate sales, leases, or other transactions in real property, as distinguished from authority to consummate the transaction. If this be so, they argue in effect and argue truly, any broker, while continuing to act solely as a broker, may yet escape from the restrictions of the act by always securing written authority, and there is no reason why any distinction should be made between brokers who always act under written authority and those who do not, so far as subjecting them to regulation is concerned.

"Such a construction of the act, however, is not a reasonable one. It would not only render

the act invalid, but, even if it did not do this, it would practically render it ineffective, since, as has been said, any broker could secure escape from its provisions merely by being careful to secure written authority in every case. A much more natural construction is that by 'power of attorney' is meant written authority to act for and in place of the principal in consummating the transaction, as distinguished from merely negotiating it. This construction removes the objection of unreasonable discrimination; for such an agent is more than a broker, and there is nothing unreasonable in not applying to him the regulations applicable to brokers."

The Supreme Court of California concedes the validity of the argument that the statute makes an unreasonable discrimination, and upholds it by reading into the statute the limitation that only those are exempted who possess a power of attorney to consummate the sale, leasing or exchange of real estate as contra-distinguished from the power of attorney to negotiate the sale, leasing or exchange of real estate.

The Legislature put no such limitation or restriction upon its power. The Court has interpolated language for which there is no warrant either of ordinary rules of construction or by reason of the existence of judicial power.

The Supreme Court of California has confessed the force of the logic. Its avoidance is wholly without support. The language of the act is plain and un-

ambiguous. If the Legislature has erred, then it is the Legislature that must recant.

In the opinion of the judges it is recognized that the power to carry on the business under a "duly executed power of attorney" may enable anyone who equips himself with this character of authority to escape the compliance with the statute, but the judges say if this becomes an evil, the Legislature may amend the statute. They, too, recognize that it is unreasonable discrimination and affords a loophole for escape from compliance with the statute.

They hold that the Legislature has deemed it necessary to regulate the business of real estate brokers and real estate salesmen; that it has declared that all who engage therein without a license are criminals, yet the judges say that the other class may with impunity engage in this business, even though they possess no license, provided they equip themselves with a power of attorney in lieu of a license. In other words, the courts recognize that a power of attorney may be substituted for a license. Yet the Court says that while this may be done, nevertheless the Legislature may amend the statute so as to obviate this evil in the use of a power of attorney shall ever become widely prevalent. But the answer to all that is that the test of the constitutionality of an act is not what is done, but what may be done under the statute.

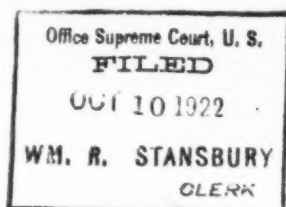
It is clear that neither the Supreme Court of California nor the Judges in the Court below, in their

opinion, have answered the issue raised; and it is, therefore, respectfully but nevertheless earnestly urged that the statute must be declared unconstitutional upon this ground.

We respectfully submit that the opinion of the lower court holding the statute unconstitutional must be affirmed.

Respectfully,

JULIAN C. WILSON,
ELIAS GATES,
WALTER P. ARMSTRONG,
Counsel for Appellees.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 239.

R. W. BRATTON ET AL., APPELLANTS,

vs.

WM. C. CHANDLER ET AL., APPELLEES.

SUPPLEMENT TO BRIEF AND ARGUMENT.

Certiorari.

**THE WRIT OF CERTIORARI AS UNDERSTOOD AND USED IN THE
COURTS OF THE STATE OF TENNESSEE.**

There are some cases in Tennessee (Conners *vs.* City of Knoxville, 136 Tenn., 428; City of Knoxville *vs.* Conners, 139 Tenn., 45—being the same case on second appeal; and State *ex rel.* *vs.* Hunt, 137 Tenn., 243) which take a distinction between the common law uses of the writ and its statutory uses; assigning to the former those cases wherein

the writ is sought in advance of a final hearing in the inferior tribunal, board or commission for the purpose of correcting an illegality in its action, or some excess of jurisdiction or absence of jurisdiction; and assigning to the "statutory writ" all of those cases in which the writ is applied for after a hearing in such inferior tribunal, board or commission (when the statute creating the tribunal grants no appeal), either for the correction of errors or for a trial on the merits in the higher court. The distinction is mainly an historical reminiscence and useful only as indicating the source of principles of practice and illustrations that may be drawn from the common law on the one hand, and the decisions rendered specifically in construction of our statutory provisions. There can be no doubt that since the passage of our Code of 1858 the whole law of certiorari has become statutory under Sections 3123 and 3124 of that Code; and so far as the matter of construction is concerned, the whole need is met as to events happening prior to a hearing in the inferior tribunal or board by the cases just referred to and those cited therein, and the case of *State ex Rel. vs. Hebert*, 127 Tennessee, 220; 241, 242, and the cases cited therein; and as to all things after such hearing it is covered by *Staples vs. Brown*, 113 Tenn., 639 (later reaffirmed in *Lewis vs. Shelby County*, 116 Tenn., 454, and *State vs. Bockman*, 139 Tenn., 422), and the cases therein cited as applicable to those inferior tribunals from whose decisions or pronouncements no appeal is given by statute; and that is enough for the purposes of the present controversy.

However, there are four other classes of cases provided for by code, section 3124, under which a multitude of cases fall, but no question affecting any of these arises here. Thus,

where the writ of certiorari is awarded "on suggestion of diminution" of a record; where the writ is sought "as a substitute for appeal," that is, where the statute gives an appeal, but the party has through his blameless misfortune, or the fraud of his adversary, failed to exercise the right within the time allowed by law; where it is sought "instead of *audita querela*," embracing the large number of cases for relief formerly provided for by that old common-law writ, and finally, where the writ is sought "instead of writ of error," or to serve the purpose of such writ.

The writ of certiorari is the most potent writ known to Tennessee practice and the broadest in its scope and application. It is hardly possible to imagine a case to which that writ is inapplicable for the purpose of assuring and furnishing a hearing where such hearing has been denied or inefficiently given.

The uses of the writ, as covered by our code (sections 3123 and 3124), are far beyond those customary under the common law. These new uses, while not customary in the English common law were, or most of them were, incidents of the practice of the courts in North Carolina before, and at the time Tennessee was separated from the mother State, and became itself a State; but that practice was the subject of continuous objection and contest on the part of many of the ablest lawyers in North Carolina and therefore could not be considered as settled in that State. To place the matter beyond controversy or doubt in the new State of Tennessee, the first constitution of our State made the right to certiorari in civil cases (there was no question in North Carolina as to criminal cases) a part of the said Constitution of 1796. This was repeated in the Constitution of 1834, and again in the

Constitution of 1870, the present Constitution of the State; the latter imposing the duty on courts of chancery as well as courts of law; in the meantime, when the Code of 1858 was passed the subject was crystallized into the two code sections referred to.

This great writ is deeply valued in Tennessee as the most effective defense against wrong to both person and property rights in our whole armory of legal weapons. The history and development of the writ in Tennessee will be found fully set forth in the following Tennessee cases:

Beck *vs.* Knapp, 1 Overton (1 Tennessee), 56-61 (year 1791).

Murfree *vs.* Leeper, 1 Overton (1 Tennessee), 1 (1791).

Kendrick *vs.* State, Cooke Report (3 Tenn.), 474 (1814).

Durham *vs.* United States, 4 Haywood (5 Tenn.), 55 (1817).

Same case, further heard, 4 Haywood (5 Tenn.), 69 (1817).

Perkins *vs.* Hadley, 4 Haywood (5 Tenn.), 147 (1817).

Arnold *vs.* Embree, Peck Report (7 Tenn.), 134 (1823).

Bob *vs.* State, 2 Yerger (10 Tenn.), 173, 176, 180 (1826).

State *vs.* Solomons, 6 Yerger (14 Tenn.), 360, 361 (1834).

Duggan *vs.* McKinney, 7 Yerger (15 Tenn.), 21 (1834).

Mayor *vs.* Pearl, 11 Hump. (30 Tenn.), 248, 252 (1850).

Dodd *vs.* Weaver, 2 Sneed (34 Tenn.), 670 (1855).
 Friedman Brothers *vs.* Mathes, 8 Heisk. (55 Tenn.),
 at pages 500 to 502, inclusive (1872).
 Saunders *vs.* Russell, 10 Lea (78 Tenn.), 294, 295
 (1882).

Constitution of 1796, article VI, section 7:

"The judges and justices of the inferior courts of law shall have power, in all civil cases, to issue writs of certiorari, to remove any cause, or a transcript thereof, from any inferior jurisdiction into their court, on sufficient cause, supported by oath or affirmation."

Tennessee Constitution of 1834, article VI, section 10:

"The judges or justices of such inferior courts of law as the legislature may establish shall have power, in all civil cases, to issue writs of certiorari to remove any cause or transcript thereof from any inferior jurisdiction into said court on sufficient cause supported by oath or affirmation."

Tennessee Constitution of 1870, article VI, section 10:

"The judges or justices of inferior courts of law and equity shall have power in all civil cases to issue writs of certiorari, to remove any cause, or the transcript of the record thereof, from any inferior jurisdiction into such court of law, on sufficient cause, supported by oath or affirmation."

The term, "inferior courts of law and equity" means all courts lower than the Supreme Court.

Hodges *vs.* State, 135 Tenn., 525-529.

This will include the Circuit and Chancery Courts of the State, and all other courts of record that may be created at any time by the legislature.

Code of 1858, Sections 3123 and 3124.

Section 3123:

"The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when in the judgment of the court there is no other plain, speedy or adequate remedy."

(Same as Shannon's Code, Section 4853.)

Section 3124:

"Certiorari lies: (1) on suggestion of diminution; (2) where no appeal is given; (3) as a substitute for appeal; (4) instead of *audita querela*; (5) instead of writ of error."

(Same as Shannon's Code, Section 4854.)

Code of 1858, Section 3126:

"The judges of the inferior courts of law have the power in all civil cases, to issue writs of certiorari to remove any cause or transcript thereof from any inferior jurisdiction, on sufficient cause, supported by oath or affirmation."

Shannon's Code, Section 4857 is the same with the following addition, viz:

"and the Chancellors of this State shall have concurrent jurisdiction with the judges of the circuit

courts of this State in granting writs of certiorari and supersedeas, removing causes from Justices' Courts to the Circuit Courts."

Code, Section 4225:

"The Circuit Courts of this State are courts of general jurisdiction, and the judges thereof shall administer right and justice according to law, in all cases where the jurisdiction is not conferred upon another tribunal."

(Same as Shannon's Code, Section 6063.)

Code, Section 4234:

"They have an appellate jurisdiction of all suits and actions of whatsoever nature or description, instituted before any inferior jurisdiction, whether brought before them by appeal, certiorari, or in any other manner prescribed by law."

(Same as Shannon's Code, Section 6072.)

The word "they" in the section refers to the circuit courts, the section being found in the chapter entitled "Of the jurisdiction and Powers of the Circuit Court."

This section was construed in *State vs. Bockman*, 139 Tenn., 422, and applied to the review of the decisions of juvenile courts from which the statute creating them granted no appeal.

The circuit court is a constitutional court and cannot be abolished by the legislature. A circuit may be abolished, but the counties composing it must be redistributed and attached to some other circuit, or circuits, so that each county may continue to have a circuit court.

Constitution of 1870, article VI, section 1:

"The judicial power of this State shall be vested in one supreme court, and in such circuit, chancery, and other inferior courts as the legislature shall, from time to time, ordain and establish; in the judges thereof, and in justices of the peace. The legislature may also vest such jurisdiction in corporation courts as may be deemed necessary. Courts to be holden by justices of the peace may also be established."

See *The Judges Cases*, 102 Tenn., 510, 531 to 549.

Circuit courts must be established in each county.

Staples vs. Brown, 113 Tenn., 645.

The legislature cannot close the courts.

Fisher's Negroes vs. Dabbs, 6 Yerger (14 Tenn.), 120, 159-160.

But may change the jurisdiction of the courts.

Constitution, article VI, section 8:

"The jurisdiction of the circuit, chancery, and other inferior courts shall be as now established by law until changed by the legislature."

But not so as to impair the right to the writ of certiorari in civil cases; that is to say, so long as there is an inferior court of law or equity in the State, that court, under the Constitution, article VI, section 10, has jurisdiction to grant, and must grant, the writ of certiorari when proper application is made "supported by oath or affirmation."

There is no other remedy in Tennessee practice so well assured and so protected against substantial change.

From the foregoing it is perceived that the certiorari as

authorized and used in the State of Tennessee covers the whole field of its employment at common law, as well as a vast addition to the common-law uses, made by the constitution and statutes of the State.

This writ is spoken of in some of the cases as a discretionary writ, but it is shown in the same cases that it is a legal discretion to be exercised after due consideration of the law and facts presented in the application for the writ, and in no sense an arbitrary discretion, and that any error in decision by the judge or court applied to in either granting or refusing the writ is subject to correction by the Supreme Court of the State, on appeal in error, or writ of error.

May vs. Campbell, 1 Tenn., 61-63;

Durham vs. United States, 4 Haywood (5 Tenn.), 54, 55;

Durham vs. United States, 4 Haywood (5 Tenn.), 69 *et seq.*;

Lawson vs. Scott, 1 Yerger (9 Tenn.), 92;

Bob vs. State, 2 Yerger (10 Tenn.), 174;

Dodd vs. Weaver, 2 Sneed (34 Tenn.), 669-672;

Briscoe vs. McMillan, 117 Tenn., 115; 133, 134.

The members of the Tennessee Real Estate Commission must exercise functions of a judicial nature, whenever they pass on an application for license, and either grant or refuse the same.

"If an officer do an act depending on the exercise of the slightest judgment or discretion on his part, then the act is judicial, whatever may be the general function of the officer. It is a judicial function to decide upon a question of individual right. A court martial exercises it in fining a man; it decides he has

forfeited that much of his money. A corporation exercises it in expelling a member. To all of these inferior jurisdictions, said Judge Carruthers, a writ of certiorari lies from the Circuit Court, whatever be the name or organism or mode of proceeding. Carruthers, L. S. (Carruthers History of a Lawsuit), 538."

Friedman Brothers vs. J. H. Mathes, 8 Heisk. (55 Tenn.), at page 502.

Respectfully submitted,

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Real Estate Boards.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 239.

R. W. BRATTON ET AL., *Appellants*,

v.s.

WM. C. CHANDLER ET AL., *Appellees*.

We acknowledge receipt of copies of appellants' supplement to brief and argument in the above case this 5th day of October, 1922.

WILSON, GATES & ARMSTROM,

Counsel for Appellees,

By ELIAS GATES.

(7433)



No. 239

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WM. R. STANSBURY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1922.

R. W. BRATTON et al.,

Appellants

vs.

WILLIAM C. CHANDLER et al.,

Appellees.

BRIEF FOR ORAL ARGUMENT

by

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**The Act is not Unconstitutional for a Hearing
is provided for by the Act itself and in
addition by the General Laws
of Tennessee.**

I.

OUR STATE LEGISLATURES HAVE POWER TO REGULATE THE REAL
ESTATE BUSINESS.

(This question is covered in Brief and Argument of
appellants, pages 49 to 53.)

(See Special Brief for oral argument on power
of State to regulate real estate business.)

II.

Enforcement of the provisions of the Tennessee License Law (Tenn. Act 1921, Ch. 98) does not amount to a taking of private property without due process of law. (This question is covered in Brief and Argument of appellants, pages 96 to 126.)

A. NOTICE IS PROVIDED.

I. The party who makes application for a license necessarily has notice of the procedure thereunder the same as a plaintiff who starts a suit thereunder.

II. Notice is given by the fact that the board has a regular place and time of meeting and the applicant himself starts the machinery of the board moving. This has often been held to be notice in tax board cases.

See:

Hagar v. Reclamation District No. 108, 111 U. S. 701, see cases, page 12.

Gundling v. City of Chicago, 177 U. S. 183, see cases, page 12.

B. A HEARING IS PROVIDED.

I. By the Act Itself.

(1) Relative to the appellees in this case:

See Sec. 15 of the Act. These appellees are all licensed brokers and salesmen under the Tennessee Act of 1919, so that the matter of considering what might be true if they were applicants is not in issue. Sec. 15 of the Act of 1921, Ch. 98 provides:

“That the Commission shall, before suspending or revoking any license, and at least ten days prior to the date set for the hearing notify in writing, the holder of such license, of any charge made, and shall afford such licensee an opportunity to be heard in person or by counsel in reference thereto.”

so that these appellees would have had notice and a hearing had they been refused another license upon application.

(2) Applicants for a license:

Right of hearing is given in the Act itself.

1. See Sec. 8, the word “procure” therein means applicant must be given a hearing. (See Argument, pp. 96-98 of Brief and Argument of appellants.)

2. Sections 15 and 8 are *in pari materia*.

The court must consider the statute as a whole, and Sections 15 and 8 treat of the same subject matter, therefore the matter in Section 15 is necessarily incorporated in Sec. 8. This principle is recognized by the lower court in this case when it read the word “corporation” as found in Section 2 of the Tennessee Act into Section 1 of the Tennessee Act. (See opinion of the court, page 49 Transcript of Record.)

This principle is also recognized by the United States Supreme Court in the case of *Engle v. O'Malley*, 219 U. S. 128.

See cases, page 14.

3. The Right of Appeal is specifically given by the Statute in the second paragraph of Sec. 15.

II. If the court should hold that a right of hearing is not given specifically in this Act, it is given under the General Laws of Tennessee.

If a hearing is really given it is not an answer to say that the hearing is not a hearing because some consideration has been given to the matter prior to the time of the hearing. It is sufficient to constitute due process of law if a hearing is actually granted.

Among the various actions under the law of Tennessee which enable one to get a hearing under the Tennessee Real Estate Brokers and Salesmen's License Law are the following:

(These questions are covered in Brief and Argument of appellants at pages 31-33, 62, 106 to 125 and in *Blackford v. State*, 55 Tenn. 528, 542.

1. By Writ of Certiorari.

The Tennessee Statute provides:

"Writ of certiorari may be granted whenever authorized by law in all cases when an inferior tribunal, board or officers exercising judicial functions has exceeded the jurisdiction conferred or is acting illegally, when in the judgment of the court there is no plain, speedy or adequate remedy."

Sec. 4853, Thompson's Shannon's Code Tenn.

The Statute further provides that certiorari lies:

1. On suggestion of dimunition,
2. When no appeal is given,
3. As a substitute for appeal,
4. Instead of *Audita querela*.

On a writ of certiorari it is the law of Tennessee that the court can go into the merits of the case.

Staples v. Brown, 113 Tenn. 639, 642-656, see cases page 15.

Lewis v. Shelby County, 116 Tenn. 454, 456-7, see cases page 16.

Kendrick v. State, Cook Rep. 3 Tenn. 474.

May v. Campbell, v. Tenn. (1 Overton) 61, see cases page 17.

Beck v. Knabb, v Tenn. (1 Overton) 55, 57, see cases page 17.

State, ex rel. v. Taylor, 119 Tenn. 229, 248, see cases page 17.

2. Mandamus. (This question is covered in Brief and Argument of appellants, page 33.)

In case the Commission should refuse to enter an application at all or to give a hearing thereon, it could be compelled to give a hearing upon the application under a writ of mandamus, and to render a decision thereon.

State v. Taylor, 119 Tenn. 229, 248, see cases page 17.

In the *Taylor* case the following language is used:
 "This doctrine was established in the Supreme Court of the United States many years ago.

In *ex parte Bradstreet*, 7 Pet., 634, 8 L. Ed. 810,

the Supreme Court of the United States issued a *mandamus* to a United States district judge to reinstate a cause which he had dismissed for want of jurisdiction, and to proceed in the trial of the same.

In *ex parte Parker*, 120 U. S., 737, 7 Sup. Ct. 767, 30 L. Ed., 818, the same court by writ of *mandamus* directed the Supreme Court of Washington territory to reinstate a cause which it had dismissed, because, in its judgment, it had no jurisdiction, and to proceed to hear the same upon its merits.

The same doctrine was announced in *ex parte Parker*, 131 U. S., 221, 9 Sup. Ct. 708, 33 L. Ed. 123,

where, in the same manner, the court commanded the Supreme Court of Washington territory to reinstate and hear a case, although the judges who had rendered the judgment of dismissal had gone out of office, and an entirely new set of judges had been installed."

As to when this court may issue a writ of mandamus to inferior courts, see *ex parte Morgan*, 114 U. S. 174, 29 Law E. 135; also see 33 Tenn. 627, 652.

The United States Supreme Court in the matter of Dayton S. Morgan, and C. Ashley Smith, Petitioners, 114 U. S. 174, said:

"It is an elementary rule that a writ of mandamus may be used to require an inferior court to decide a matter within its jurisdiction and pending before it for judicial determination, but not to control the decision. *Ex parte Flippin*, 94 U. S. 350 (bk. 24 L. ed., 875); *Ex parte Burtis*, 103 U. S. 238 (bk. 26, L. ed. 392). Here a judgment has been rendered and entered of record by the Circuit Court in a suit within its jurisdiction. The judgment is the act of the court. It is recorded ordinarily by the clerk as the ministerial officer of the court, but his recording is, in legal effect, the act of the court, and subject to its judicial control. The clerk records the judgments of the court, but does not thereby render the judgments. If there is error in the judgment as rendered, it cannot be corrected by mandamus, but resort must be had to a writ of error or an appeal. *Ex parte Loring*, 94 U. S. 418 (bk. 24 L. ed. 165). *Ex parte Perry*, 102 U. S. (bk. 26 L. Ed. 43).

3. Writ of Injunction. (This question is covered in Brief and Argument of appellant, pages 33 and 34.)

Winston v. T. & P. R. R. Co., 60 Tenn. 60, see cases page 18.

Smith v. Carter, 131 Tenn. 1, see cases page 19.

Berry v. Shelby County, 139 Tenn. 532, see cases page 20.

4. Defense to an Indictment. (This question is covered in Brief and Argument of appellant, 33 and 34.)

Budd v. State, 22 Tenn. 481, see cases page 20.
Hatcher and Lee v. State, 80 Tenn. 368, see cases page 20.

Sutton v. State, 96 Tenn. 696, see cases page 21.

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III.

The provision of the Tennessee Real Estate License Law, Section 2 thereof, to the effect that "The provisions of this Act shall not apply to any persons holding a duly executed power of attorney from the owner for the sale, leasing or exchange of real estate," does not deny to any person the "equal protection of the law" within the meaning and prohibition of the Fourteenth Amendment of the Constitution of the United States.

The prohibition against the denial of equal protection of the laws does not require that the law shall have an equality of operation, in the sense of an indiscriminate operation on persons merely as such, but on persons according to their relation. It does not prevent states from distinguishing, selecting and classifying objects of legislation within a wide range of discretion, provided only that the discretion must be based upon some reasonable ground: *Interstate Consol. St. Ry. Co. v. Massachusetts*, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555; affirming *Com. v. Ry. Co.*, 187 Mass. 436, 73 N. E. 530, 11 L. R. A. (N. S.) 973, 2 Ann. Cas. 419; some difference which bears a just and proper relation to the classification and not a mere arbitrary selection: *Magown v. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Watson v. Maryland*, 218 U. S. 173, 30 Sup. Ct. 644, 54 L. Ed. 987.

Legislation which regulates business may well make distinctions dependent upon the degrees of evil without being unreasonable or in conflict with the equal protection of the laws: *Heath & Milligan Mfg. Co. v. Worst*, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236.

The mere fact of classification will not relieve; it must be based on reasonable grounds and not mere arbitrary selection; but it suffices if the statute is applicable to all persons under like circumstances and does not subject individuals to an arbitrary exercise of power: *Jones v. Brim*, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; or if a law operates alike upon all persons similarly situated: *Walston v. Nevin*, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544; or a law or course of proceedings has been applied to any other person in the State under similar circumstances and conditions: *Tinsley v. Anderson*, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91.

Legislation may be limited as to objects or territory if all persons subject to it are treated alike under like circumstances and conditions: *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578; *Giles v. Teasley*, 193 U. S. 148, 24 Sup. Ct. 359, 48 L. Ed. 655.

"Classification must have relation to the purpose of the legislature, but logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion even though it result in ill-advised, unequal and oppressive legislation": *Heath & Milligan Mfg. Co. v. Worst*, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236, quoting *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238.

In order to avoid denial of equal protection of the laws the police power must be exercised reasonably and not arbitrarily: *Yick Wo. v. Hopkins*, 118 U. S. 365, 6 Sup. Ct. 1064, 30 L. Ed. 220.

The placing of men who act as real estate brokers and salesmen in one class and those who act with a power of attorney in another class in the Tennessee Real Estate Brokers License Law is based upon a fundamental distinction between the two relationships and results in a classification which has a relation to the purpose of the legislation, and is based on reasonable ground and not on mere arbitrary selections.

There is a fundamental distinction between a real estate broker or salesman and one who acts under a power of attorney. A real estate broker or salesman has as his chief duty the bringing of two parties together, one who wishes to buy and one who wishes to sell. The real estate broker or salesman does not consummate the deal. On the other hand, one with a power of attorney is in legal contemplation in the same position as the owner himself, and it is his particular function to consummate the real estate deal. The element of a *vocation*, either whole or partial, is entirely absent. One will note also that a power of attorney is a link in the chain of title and that the instrument by which it is created must be recorded along with the deed given.

(a) The District Court of the United States for the Western District of Tennessee, from which this appeal is taken, recognized this distinction in this specific case and disposed of it by saying (page 49 Transcript of Record):

"The further claim that the act is discriminatory because it does not apply to persons holding a duly executed power of attorney from the owner for the sale, lease, or exchange of real estate, is equally untenable. A power of attorney is something out of the ordinary in the average real estate transaction. A power of attorney transfers from the owner to the donee of the power full authority to deal with it as his own. Such power is, therefore, seldom or never granted by the owner except to persons in whose honesty and ability he has special confidence and trust.

The person holding such power of attorney represents but one party to the transaction. He acts in the capacity of owner and has not, or at least should not have, any interest therein adverse to the owner.

While there is no evidence upon this subject yet it is perhaps common knowledge that a power of attorney is not executed and delivered in any substantial ratio to other real estate transactions. It is true perhaps that an attempt may be made to defeat the purpose of this law by resorting to a power of attorney, but in that event a power of attorney will come into such common use that the legislature will feel entirely justified in amending this act so that persons holding a power of attorney shall not be exempt from its provisions. However, that may be, it has not been made to appear to this court by any evidence, that a power of attorney is in such common use in Tennessee real estate transactions that the legislature was not entirely justified in making such exception.

The object and purpose of this act is to regulate the business of real estate brokers and real estate salesmen and that particular business is not usually conducted through the medium of a power of attorney, but rather by bringing the buyer and seller together under such circumstances that each may act in his own behalf."

(b) The State of California has a Real Estate Broker and Salesman License Law similar to the Tennessee Act under consideration. (See Chapter 605, Statutes 1919, page 1252, amended by Chapter 751, approved 1921.) Both the California and Tennessee acts are avowedly modeled after the Michigan Act which in turn was based upon the so-called "Model Law" drafted by Mr. Nathan William MacChesney as counsel for the National Association of Real Estate Boards and which has been the basis of the legislation upon the subject in thirteen states namely: Arizona, Colorado, Idaho, Illinois, Louisiana, Michigan, Montana, New Jersey, Oregon, Tennessee, Wisconsin and Wyo-

ming. The California Act, Section 2, provides: "The provisions of this Act shall not apply to persons holding a duly executed power of attorney from the owner. * * *" which it will be noted is practically the same wording as the Tennessee Act. The constitutionality of this provision in the Act was attacked in the California Supreme Court in the case of *Riley v. Chambers*, 181 California 589, in reply to which the court said:

"The second objection of *amici curiae* along this line is that an unreasonable distinction is made when the act excepts 'persons holding a duly executed power of attorney from the owner.'"

"The soundness of this objection depends upon what is meant by a 'power of attorney.' Power of attorney to do what? The act does not say. Any written authority by one man to act for another may be said to be a power of attorney and the argument of *amici curiae* is that as used in the act in question it must include authority to act as broker merely, to negotiate sales, leases, or other transactions in real property, as distinguished from authority to consummate the transaction. If this be so, they argue, in effect, and argue truly, any broker, while continuing to act solely as a broker, may yet escape from the restrictions of the act by always securing written authority, and there is no reason why any distinction should be made between brokers who always act under written authority and those who do not, so far as subjecting them to regulation is concerned."

"Such a construction of the act, however, is not a reasonable one. It would not only render the act invalid, but even if it did not do this, it would practically render it ineffective, since, as has been said, any broker could secure escape from its provisions merely by being careful to secure written authority in every case. A much more natural construction is that by power of attorney is meant written authority to act for and in place of the principal in consummating the transaction as distinguished from merely negotiating it. This construction removes the objection of unreasonable discrimination, for such an agent is much more than a broker and there is noth-

ing unreasonable in not applying to him the regulations applicable to brokers.”

(c) The exception of those who hold a duly executed power of attorney from the provisions of this act in Section 2 thereof was the result of mere excessive caution of the State legislature, when it passed this Act for one with a power of attorney would not have come within the purview of the Act if the exception were never mentioned, for as the court said in *Riley v. Chambers, supra*:

“The fourth point of *amici curiae* is that trustees selling under a deed of trust are excepted, and no exception is made of trustees doing anything else than selling, such as leasing or renting, or collecting rents. The reply is that trustees, whether selling or doing something else, do not come within the purview of the act. The express exception of trustees selling under a deed of trust adds nothing and the act would be the same if it made no mention of trustees.”

(d) If the foregoing provision is invalid it may be eliminated. (See appellant's Brief and Argument, pages 26, 27 and pages 102 to 105.)

However, if the court feels that this provision violates the constitutional guarantee of “equal protection of the law,” nevertheless, the rest of the statute is left unimpaired, for after the objectionable part is eliminated, the balance is valid and capable of being carried out and it is apparent that the legislature would have passed this law if this clause had been omitted.

Abstracted Cases.

Hagar v. Reclamation District, No. 108, 111 U. S. 701.

"The bills in this case were filed in the District Court of California, by the appellee to enforce the payment of certain assessments on the lands of the defendant, Hagar, for reclamation purposes.

The causes were removed into the court below on petitions by the defendant. That court entered a decree for the complainant, declaring the assessments to be valid liens upon the lands of the defendant, and ordering a sale of said lands to pay said assessments with interest and costs, amounting in all to \$51,257.42. Whereupon, the defendant appealed to this court. Page 701."

The court held that the California law under which the assessment in this case was made and levied, does not conflict with the clause of the 14th amendment of the Constitution, declaring that no State shall deprive any person of life, liberty or property without due process of law.

"Where a tax is levied on property, not specifically but according to its value, to be ascertained by assessors, the law in prescribing the time when complainants will be heard, gives all the notice required, and the proceeding, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law; so, where the assessment may be revised by proceedings in the courts." Page 701.

Gundling v. City of Chicago, 177 U. S. 183.

FACTS.

An ordinance of the City of Chicago fixed a license fee of \$100 for the privilege of selling cigarettes and gave the mayor power to refuse to grant a license to sell cigarettes to persons not having good character and reputation, and provided a penalty of a fine of from \$50 to \$200 for selling cigarettes without a license.

Gundling refused to pay the license and sold cigarettes. He was fined \$50 in the police court for selling cigarettes without a license. He appealed to the Criminal Court of Cook County and from there to the Illinois Supreme Court, each of the courts holding against him. Then he appealed to the United States Supreme Court, the grounds of appeal being the fact that this was an unreasonable exercise of the police power and so deprived him of his property without due process.

The court held as to this point:

“The ordinance in question here does not grant to the mayor arbitrary power such as is described in the above mentioned laundry case, but the provision is similar to that mentioned in the foregoing extract from the opinion in that case. In the case at bar, the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be intrusted with the sale of cigarettes, provided such applicant will file a bond as stated in the ordinance, as a security that he will faithfully observe and obey the laws of the State and the ordinances of the City with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature by him. There is no proof nor charge in the record that there has been any discrimination against individuals applying for a license or any abuse of discretion on the part of the mayor. Whether dealing in and selling cigarettes

is that kind of a business which ought to be licensed, is, we think, considering the character of the article to be sold, a question for the State, and, through it, for the city to determine for itself, and that an ordinance providing reasonable conditions upon the performance of which a license may be granted to sell such article does not violate any provision of the Federal Constitution.

Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference." Page 728.

Engel v. O'Malley, 219 U. S. 128.

"This is a bill in equity to prevent the carrying out of Chapter 348 of the Laws of New York for 1910, which forbids individuals or partnerships to engage in the business of receiving deposits of money for safe-keeping, or for the purpose of transmission to another, or for any other purpose, without a license from the comptroller." Pages 134-135.

"*After notice* shall have been posted for two weeks the comptroller may approve or disapprove the application, in his discretion, and licensees are to pay a fee of \$50. Sec. 25. The license is revocable at all times by the comptroller for cause shown." Page 134.

"The business of receiving deposits of money in small sums from time to time until they reach an amount sufficient to be sent to other States or foreign countries is banking, and as such is a proper subject for regulation in the exercise of the police power of the State." Page 128.

"The possibility that the comptroller may refuse a license to a private banker upon his arbitrary whim does not invalidate, under U. S. Const. 14th Amend. the requirement of N. Y. Laws 1910, Chapt. 348, that a license from that official be obtained by individuals or partnerships desiring to engage in that business." Page 129.

Staples v. Brown, 113 Tenn. 639, 655.

Certiorari lies in City Court of Reviews to re-try cases tried by all inferior tribunals. Complainant contested the report of city officers as to the results of an election in which he was a candidate. The City Council reported an opposing candidate elected. Upon appeal to the court it was held that the complainant had been denied his office, to which he had since proven he was duly elected, without the benefit of a hearing. Among other things the court said:

"The Circuit Courts of this State are courts of general jurisdiction, and the judges thereof shall administer right and justice according to law in all cases where the jurisdiction is not conferred upon another tribunal." Page 654.

"They have an appellate jurisdiction of all suits and actions, of whatsoever nature or description, instituted before an inferior jurisdiction, whether brought before them by appeal, certiorari, or in any other manner prescribed by law." Page 645.

"They may grant writs of certiorari whenever authorized by law, and also in all cases where an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when in the judgment of the court there is no plain, speedy or adequate remedy." Pages 645, 646.

"The plaintiff claims in his petition, which must be taken as true for the purposes of this hearing, that he has been elected to the office of City Attorney of Harriman, that he has been denied the right to exercise the functions and receive and enjoy the emoluments of this office, and that he is entitled to his day in court to have his title to the office tried and deter-

mined. We think that he has this right, and that he has pursued the proper remedy to enforce it." Page 655.

"Certiorari lies: (1) On suggestion of diminution; (2) where no appeal is given; (3) as a substitute for appeal; (4) instead of *audita querela*; (5) instead of writ of error." Code (Shannon's Ed.), Sections 4853 and 4854.

"This injunction of the Circuit Court to supervise and review upon the merits the proceedings of all inferior jurisdictions, especially those proceedings not according to the course of the common law, by certiorari and supersedeas, where no appeal is allowed or writ of error will lie has been recognized and exercised from the earliest days of our judicial history, and is now too firmly established by constitutional provision, statutory enactment and judicial decision to be a subject of controversy." Page 646.

Lewis v. Shelby County, 116 Tenn. 454, 456-7.

This is an appeal from the award of Commissioners of damages for the destruction of diseased animals, destroyed in the interest of public safety.

"We are of the opinion that the inspector had, under the police power, the right to destroy the mule, and this could not be questioned in any subsequent proceeding. The proceedings, however, before the Commissioners, instituted, for the purpose of fixing the value of the mule were judicial on their merits. The Commissioners constitute one of the numerous inferior tribunals, created by the legislature from time to time, without the granting of a right to an appeal or writ of error to the parties concerned. The judgment of such tribunal may, however, still be reviewed. The proper practice in such a case is an application to the Circuit Court for a writ of Certiorari. Either party dissatisfied may apply for this writ and have the question re-examined upon the merits in the Circuit Court."

May v. The Executors of R. Campbell, 1 Tenn. (Overton) 61).

The writ of certiorari is the proper means of exercising the superintending control of the superior tribunals over inferior tribunals, and the power can not be taken away by inference.

“Our constitution seems to have designed that it should be a writ of common remedy as well before as after trial upon sufficient cause being shown by affidavit.” (Page 63.

Beck v. Knabb, 1 Tenn. (Overton) 56.

“Our law supposes, and, it is believed, with propriety, that the injustice of a decision made by an inferior tribunal can not be remedied so satisfactorily and effectually in any other way as by review in a superior tribunal, as to fact as well as law. The practice both of North Carolina and of this State has settled the point by certiorari. The law supposed injuries to have arisen in the inferior courts of record, from misconception of matter of law, and not of fact.” Page 59.

“When a court is satisfied by affidavit that a party could not take his ordinary remedy by appeal, which is a matter of right, a certiorari should be granted and the cause ought to proceed in the same manner as an appeal, being its substitute.” Page 60.

It is held that certiorari is a proper proceeding for review of actions of an inferior tribunal both after as well as before trial upon the facts as well as upon the law.

State ex rel. v. Taylor, 119 Tenn. 229.

Mandamus will lie to compel a county trustee to take jurisdiction of proceedings for reassessment or back assessment of property for taxation.

“The bill in this case was filed in the chancery court of Shelby County to obtain a mandamus against the county trustee of Shelby County in respect to an

application made by relator before the latter, concerning a reassessment, or back assessment, of the property of the Memphis Street Railway Company. The chancellor awarded an alternative writ, which was served upon the defendant. The latter, instead of making a return to the writ directly, demurred to the bill, and this was treated in the court below as properly raising the question presented in the case, and will be accordingly so treated here, without passing upon the propriety of the practice adopted." Page 233.

The defendant demurred, the chancellor sustained the demurrer, and dismissed the bill in the court below, and this is an appeal to the Supreme Court. After reviewing the merits of the case, the court said:

"In view of the construction given to the act, and our holding that the controversy as set forth in the bill falls within the provisions of Section 31, no other conclusion is possible than that a proper case was stated for the jurisdiction of the county trustee; that the affidavit fails to show any reason why he should not take jurisdiction and proceed with the hearing of the case; in short, that it appears the defendant has no valid defense to offer against the issuance of the peremptory writ of mandamus." Page 276.

"Let the order as above indicated be made for a remand to the chancellor with the direction to issue a peremptory mandamus." Page 277.

Winston v. T. & P. R. R. Co., 60 Tenn. 60.

"This bill was filed by Winston and a hundred or more of the taxpayers of Smith County, on behalf of themselves and other taxpayers of said county, to have an order of the County Court of said county declared void, submitting the question of subscriptions of \$300,000 to the Tennessee & Pacific Railroad Co. to a vote of the people of the county, as well as all the proceedings under said order; and also to enjoin the County Court from issuing the bonds of the county for said sum, and the levy of any taxes to pay interest on the bonds, with a prayer for general relief. In short, the object of the bill is to enjoin the subscrip-

tion, and have it annulled for the reasons set out in the bill, with a perpetual injunction against its collection, or enforcement, as against the county." Pages 63-64.

"Where a county has made an authorized subscription of stock to a Railroad Company, parties who have an interest to defeat it need not wait for the bonds of the county to be called for by the company, nor for their issuance, or attempt to issue them, nor for the assessment of a tax to pay the subscription, but may file their bill at once, and obtain an injunction." Page 61.

The court held that the order of the County Court, directing the execution to be held, was without authority of law, it being purely ministerial and was void so that no election could lawfully be held under the same.

Smith v. Carter, 131 Tenn. 1.

"The bill in the present case was filed by certain taxpayers of Washington County to test the constitutionality of Chapter 43 of the First Extra Session of the Acts of the Legislature of 1913.

The first section of the act reads:

"That road improvement districts may be organized in the State of Tennessee for the purpose of constructing new roads, bridges, and culverts, and maintaining public roads already established, and to have full control of all public roads within the territory embraced within such road improvement districts; and such road improvement districts organized under the provisions of this act may issue and sell interest bearing coupon bonds under the provisions of this act for the purpose of grading, graveling and improving public roads within the road improvement district, and building bridges, levees and culverts on said roads.'" Pages 2-3.

The court took jurisdiction in this case and held the above act unconstitutional, saying: "The act is void and the bill correctly challenged it."

Berry v. Shelby County, 139 Tenn. 532.

"The bill was filed by a taxpayer of Shelby County, in behalf of himself and all other taxpayers to have declared void \$150,000 of bonds which the county was about to issue under Chapters 295 and 479 of the so-called Private Acts of 1917, and certain orders of the County Court based on these two acts. The ground of attack is that the bonds were to be issued in aid of Bolton College without the submission of the proposition to the people of Shelby County for a vote thereon, pursuant to the second paragraph of Section 29 of Article 2 of the Constitution of 1870. The chancellor dismissed the bill, and the complainant has appealed. On application the cause was advanced for hearing at the present term as being a matter of public interest." Pages 533-534.

A perpetual injunction was granted by the court and the bonds were declared void.

Budd v. The State, 22 Tenn. 481.

This was an indictment against a bank clerk for false entry in the ledger under a statute making it a felony for an officer, agent or servant of the Union Bank to make such false entry. Proper defense to the indictment having been heard, the act was held unconstitutional, as not in accordance with the law of the land, for it did not apply to all banks and their employes, but only to the Union Bank.

"The law of the land is a rule alike embracing and equally affecting all persons in general, or all persons who exist, or may come into the like state and circumstances; and consequently, an act creating a new felony in relation to the officers, agents, and servants of a particular bank, and to them only, is not a law of the land in the sense of our Bill of Rights." Pages 483-484.

Hatcher & Lee v. State, 80 Tenn. 368.

"In these cases the parties are indicted for selling liquor within four miles of an incorporated institution of learning, in one count, and in the other for selling without license.

They have been convicted on both counts by a jury, judgment rendered in accord with the finding of the jury, and have appealed in error to this court.

The cases are brought here as one object to test the constitutionality of the Act of 1877, Ch. 23, known as the 'four-mile law,' forbidding the sale of intoxicating liquors within four miles of an incorporated institution of learning, the second section forbidding the act shall not apply to sale of liquors within the limits of an incorporated town." Page 369.

"It is seen that the prohibition is not applicable to all municipal corporations of the State, but is confined only to a few with exceptional charters." Page 371.

The court held the act void because of lack of universality.

Sutton v. State, 96 Tenn. 696.

"No-Fence Law" held unconstitutional.

"Joe Sutton was indicted and convicted in the Criminal Court of Shelby County for unlawfully and knowingly permitting his livestock to run at large, in violation of what is known, popularly, as the 'no-fence law,' the same being Ch. 182 of the Acts of 1895. He was fined twenty-five dollars, and has appealed in error.

The indictment is in good form, and the proof is plenary; but the contention is made, on behalf of the plaintiff in error, that the statute is unconstitutional, and consequently, that his motion in arrest of judgment should have been sustained." Pages 697-698.

The court held the act unconstitutional, saying: First, that it was not so framed as to extend to and embrace equally all persons who were or might be in the like situation and circumstances, and secondly, the classification was not natural and reasonable, but arbitrary and capricious.

Respectfully submitted,

NATHAN WILLIAM MACCHESNEY,
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Chicago, Illinois.



No. 239

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OCT 9 1922

**WM. H. STANS
CL**

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1922.

R. W. BRATTON et al.,

Appellants

VS.

WILLIAM C. CHANDLER et al.,

Appellees.

**Brief on the Power of the State to Regulate the
Real Estate Business for Oral Argument**

by

NATHAN WILLIAM MAC CHESNEY.

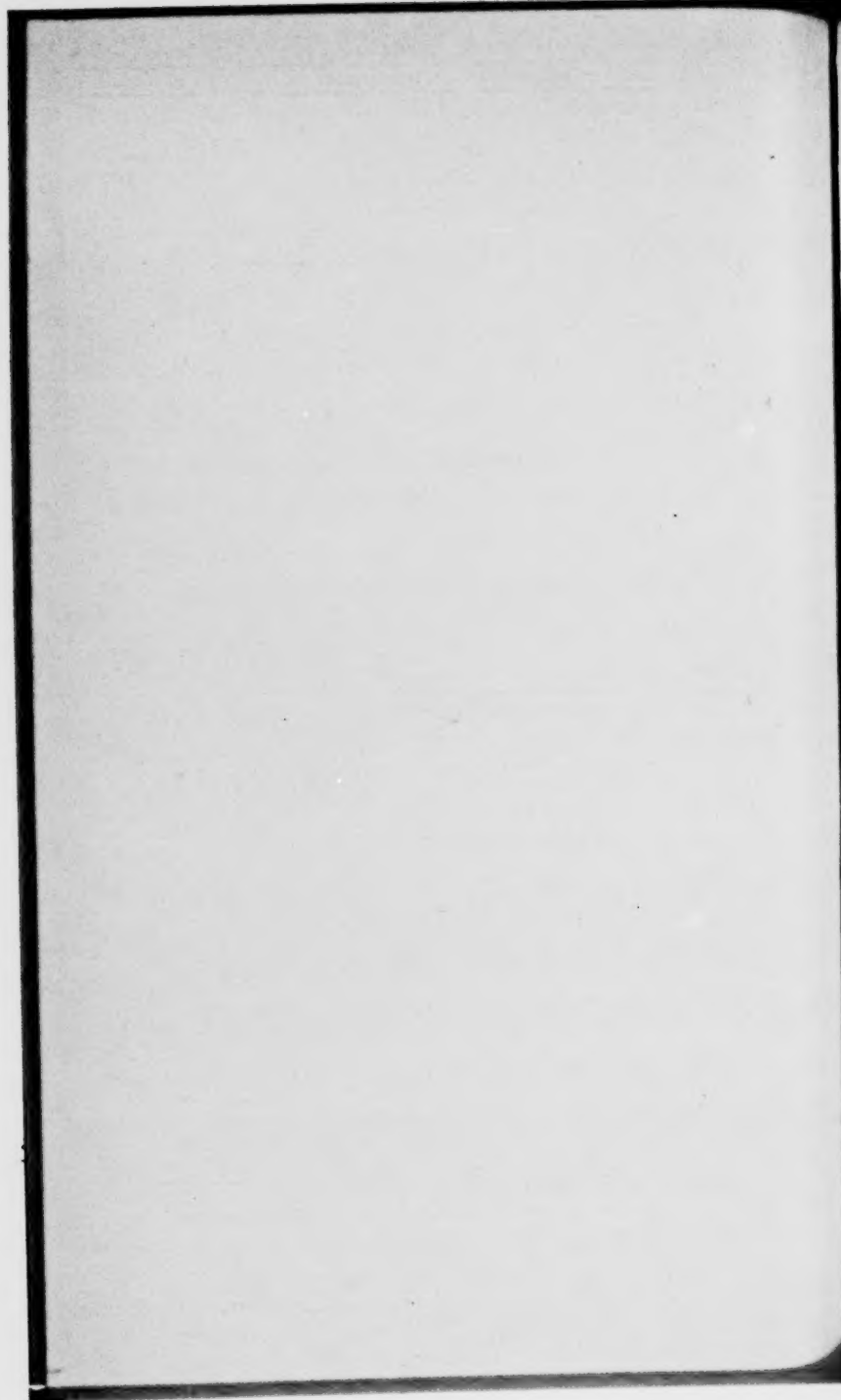
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The Legislature of the State Has the Power to Regulate the Real Estate Business in Behalf of the Public Welfare.

The police power of a State is a means of furthering public welfare by protecting the primary social interests of safety¹, health², order³, and morals⁴, and the possession and enjoyment of all rights are subject to such reasonable limitations as may be deemed proper by the governing authority of the country⁵. Its method is that of restraint and compulsion by means, among others, of the following mediums; reports⁶, registration⁷, inspection⁸, prohibitory legislation⁹, marks and signs¹⁰, notices¹¹ and licenses¹².

We have all noted that that which is considered of prime social importance and the means by which the

¹E. E. Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115, see pages 9 and 10 of cases.

²Francis Barbier v. Patrick Connolly, 113 U. S. 27, 28 L. Ed. 923, see page 12 of cases; Sarah M. Hutchinson v. City of Valdosta, 227 U. S. 303, 57 Law. Ed. 520. See page 13 of cases.

³Crowley v. Christensen, 137 U. S. 86, 34 L. Ed. 620, 11 Sup. Ct. Rep. 13. See page 13 of cases.

⁴Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989. See pages 13 and 14 of cases; Hall v. Geiger-Jones Co., 242 U. S. 539.

⁵Hall v. Geiger-Jones Co. and Merrick v. N. W. Halsey & Co., supra; German-Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. Ed. 1011, L. R. A. 1915 C. 1189, 34 Sup. Ct. Rep. 612; Engel v. O'Malley, 219 U. S. 128, 55 L. Ed. 128, 31 Sup. Ct. Rep. 612; Riley v. Chambers, 8 L. R. A. 419; Gundling v. Chicago, 177 U. S. 183-188; Hall v. Geiger-Jones Co., 242 U. S. 539. See page 15 of cases. Budd v. The People of the State of New York, 117 N. Y. See page 16 of cases. Atlanta Coast Line v. Goldsboro, 232 U. S. 548. See page 16 of cases. George E. Hawthorne, et al. v. The People of the State of Illinois, 109 Ill. 302. Page 17 of cases. Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 567. See page 17 of cases. C. B. & Q. R. Co. v. Ill. ex rel. Grimwood, 200 U. S. 592. See page 18 cases. William L. Wassa v. Midland Carbon Co., 65 Law Ed. 134. See page 18 cases.

⁶Lamder v. Chicago, 111 Ill. 291.

⁷T. Iowa 283, 404 (N. Y.).

⁸Schumacher v. New York, 166 N. Y. 103.

⁹Belbe v. State, 6 Ind. 501.

¹⁰State v. Snow, 81 Ia. 642.

¹¹Collins v. New Hampshire, 171 U. S. 30.

¹²Ash v. The People, 11 Mich. 347; Geo. P. Braun, et al. v. City of Chicago, 110 Ill. 186. See page 1 of cases.

ideals of an age are attained vary from generation to generation; that we have ever changing standards of moral sanctions, social customs and varying methods of evaluating matters of public welfare, so that an act which in primitive society would be considered within the proper scope of personal discretion might, with the complicated structure of an advanced society, be considered a personal liberty so wrought with social danger as to become a badge of anarchy, a mere license and the proper subject of regulation or prohibition. We have also noted that businesses are subject to the same process of social evaluation and restraint; that a business which has previously been considered as quite indifferent in social aspect might by its changed circumstances and nature be thought to so affect the public concern or welfare that it becomes the proper subject for regulation and prohibition in the interest of common good.¹³

A few among the various subjects which have come under the critical eye of the legislature as demanding restraint in behalf of public welfare are: weights and measures¹⁴, renting dwelling houses¹⁵, regulating train stops¹⁶, registration of land titles¹⁷, hours of labor¹⁸, pure

¹³*Ins. Co. v. Kansas*, 233 U. S. 389; *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391; *German Alliance Ins. Co. v. Lewis*, 232 U. S. 389; *Adams v. Tanner*, 244 U. S., 590-596; *Murphy v. California*, 225 U. S. 623-628.

¹⁴*Merchants Exchange of St. Louis v. State of Mo. at the Relation of John T. Barker*, 248 U. S. 300, 63 L. Ed. 300. See page 19 of cases. *State v. Mill Co., et al.*, 123 Tenn. 399; *Neas v. Borches*, 109 Tenn. 398; *People v. Girard*, 145 N. Y. 105; *People v. Lurks*, 195 N. Y. 377; *People v. Wagner*, 86 Mich. 594; *Squire v. Tellier*, 185 Mass. 18; *State v. Campbell*, 64 N. H. 402; *State v. Fourcade*, 45 La. Ann. 717; *Butler v. Chambers*, 36 Minn. 69; *Waterbury v. Newton*, 50 N. J. Law. 534; *Lemieux v. Yoring*, 211 U. S. 489; *People v. Bottling Works*, 168 N. Y. Suppl. 570. See page 20 of cases.

¹⁵*Marcus Brown Holding Co. v. Feldman, et al.*, 269 Fed. 307. See pages 21 and 22 of cases. *Edgar A. Levy Leasing Co., Inc. v. Jerome Siegel*, 66th Law Ed. 326; 810 West End Ave., Inc. v. Henry R. Stern, 66th Law Ed. 326. See pages 22 to 24 cases.

¹⁶*Lake Shore & Michigan Southern Railway Co. v. State of Ohio, ex rel. Geo. L. Lawrence*, 173 U. S. 285, 43 L. Ed. 702. See pages 26 and 27 of cases.

¹⁷*American Land Company v. Louis Zeiss*, 219 U. S. 47, 55 L. Ed. 82. See page 27 of cases.

¹⁸*Albert F. Holden v. Harvey Hardy*, 169 U. S. 366, 42 L. Ed. 780. See pages 28 and 29 of cases.

food¹⁹ delivery of green citrus fruit in commerce²⁰; inspection laws²¹; adulteration²²; dead bodies²³; fish²⁴; game²⁵; gas²⁶; hospitals²⁷; poisons²⁸; fences²⁹; cemeteries³⁰; asylums³¹; explosives³²; Sunday laws³³; protection of debtors³⁴; protection of laborers³⁵; employment of women and children³⁶; drunkenness³⁷; prostitution³⁸; gambling³⁹; liquor traffic⁴⁰; opium⁴¹; cruelty to animals⁴² and crime prevention.⁴³

Among the various businesses which by their circumstances and nature have now come to be considered as being affected by a public interest so that legislation on behalf of the public welfare has been considered necessary are: warehouse men⁴⁴; milk business⁴⁵; insurance⁴⁶;

¹⁹*Armour & Co. v. North Dakota*, 240 U. S. 510, 60 L. Ed. 771, 774. See page 30 of cases.

²⁰*S. J. Sligh v. James A. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835. See page 31 of cases.

²¹*Turner v. Maryland*, 107 U. S. 38.

²²*State v. Smyth*, 14 R. I. 100.

²³*Re Wong Yung Quy*, 2 Fed. Rep. 624.

²⁴*People v. Elk River Co.*, 107 Cal. 214.

²⁵97 Ill. 320.

²⁶*State v. Ohio Oil Co.*, 1150 Ind. 21.

²⁷*Selectman v. Murray*, 16 Pike 121.

²⁸*State v. Sherod*, 80 Minn. 446.

²⁹*Busbee v. Commissioners Wate County*, 93 N. C. 143.

³⁰*People v. Pratt*, 129 N. Y. 68.

³¹*Red Dowdell*, 169 Mass. 387.

³²*Davenport v. Richmond City*, 81 Va. 636.

³³*Hennington v. George*, 163 U. S. 399.

³⁴See *Stimson Sections 4813-4819 and 4832*.

³⁵See *Industrial Commission Report*, 1900, Vol. 5.

³⁶*American Car & Foundry Co. v. Armantraut*, 214 Ill. 509.

³⁷*Tate v. Davidson*, 143 Mass. 590.

³⁸*Dun v. Com. for use of Cattletsburg*, 20 Ky. L. Rep. 1649.

³⁹*Swigart v. People*, 154 Ill. 234; *Booth v. Illinois*, 184 U. S. 425.

⁴⁰*Leighton v. Maury*, 76 Va. 865.

⁴¹*Tuck v. Sears*, 29 Oregon 421.

⁴²*State v. Karstendeck*, 49 La. Ann. 1621.

⁴³*Presser v. Illinois*, 116 U. S.

⁴⁴*Munn v. Illinois*, 94 U. S. 113. See page 32 of cases. *Brass v. North Dakota*, 153 U. S. 391. See page 32 of cases.

⁴⁵*People of the State of New York, ex rel. Simon Lieberman v. John E. Van de Carr*, 199 U. S. 552, 50 Law Ed. 305. See page 34 of cases.

⁴⁶*Phillip La Tourette v. Fitz High McMaster, as Insurance Commissioner of the State of S. C.* 248 U. S. 465, 63 Law Ed. 362. See page 35 of cases. *German Alliance Insurance Co. v. Ike Lewis*, 233 U. S. 389. See page 36 of cases.

physicians⁴⁷; detective agencies⁴⁸; banking⁴⁹; locomotive engineers⁵⁰; sale of securities⁵¹; employment agencies⁵²; real estate brokers⁵³; cigarette vendors⁵⁴; brokers, barbers, teachers, carriers, dentists, lawyers, pawn brokers, druggists, laundries, commission merchants, hotel keepers, peddlers, auctioneers and ticket brokers, though one might mention hundreds of other businesses.

It has been held that it is primarily for the legislature to select the business to be regulated⁵⁵, in that that which makes for the general welfare is matter of legislative judgment and discretion, being concerned with questions of expediency and policy, whereas, judicial review is lim-

⁴⁷*Benjamin Hawker v. People of the State of New York*, 170 U. S. 189, 42 L. Ed. 1002. See pages 36 and 37 of cases. *Frank M. Dent v. The State of West Virginia*, 129 U. S. 112, 32 Law. Ed. 623-624. See pages 38 to 40 of cases.

⁴⁸*Dan S. Lehon v. City of Atlanta*, 242 U. S. 590, 61 L. Ed. 145. See page 41 of cases.

⁴⁹*Engel v. O'Malley*, 219 U. S. 128, 55 Law. Ed. 128. See page 42 of cases. *Noble State Bank v. Haskell, et. al.*, 219 U. S. 104. See page 42 of cases.

⁵⁰*Joseph J. Smith v. State of Alabama*, 124 U. S. 465, 31 Law Ed. 508. See page 43 of cases.

⁵¹*Harry T. Hall v. Geiger-Jones Company*, 242 U. S. 539, 61 Law Ed. 480. See page 44 of cases. *State v. Gopher Tire & Rubber Co.*, 177 N. W. 937 (Minn.). See page 45 of cases. *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559; 61 L. Ed. 493; 37 Sup. Ct. Rep. 224. See page 4 of cases. *Merrick v. N. W. Halsey & Co.*, 242 U. S. 568; 61 L. Ed. 498, 37 Sup. Ct. Rep. 227. See pages 46 to 48 of cases.

⁵²*Le Roy Brazee v. People of the State of Michigan*, 241 U. S. 340, 60 Law Ed. 1036. See page 48 of cases. *George W. Price v. The People of the State of Illinois*, 191 Ill. 114. See page 48 of cases. *Joe Adams v. W. V. Tanner and George H. Crandall*, 244 U. S. 590, 61 L. Ed. 1336. See pages 48 and 49 of cases.

⁵³*Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131; *Com. v. Real Estate Trust Co.*, 211 Pa. 5, 60 Atl. 551; *Com. v. Samuel Balck Co.*, 233 Pa. 74, 72 Atl. 261; 19 Cyc. 187; *Little Rock v. Barton*, 33 Ark. 436; *Denning v. Yount*, 62 Kan. 217, 50 L. R. A. 103; 61 Pac. 803; *Buckley v. Humason*, 50 Minn. 195; 16 L. R. A. 423, 36 Am. St. Rep. 637, 52 N. E. 385; *Blackford v. State*, 8 Heisk. 538; *St. Louis v. McCann*, 157 Mo. 301, 57 S. W. 1016; *Braun v. Chicago*, 110 Ill. 186; *Banta v. Chicago*, 172 Ill. 204, 40 L. R. A. 611, 50 N. E. 233; *Riley v. Chambers*, 181 589. See page 51 of cases. *Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623; 9 Sup. Ct. Rep. 233; *Ex Parte Whitley*, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; *Ex Parte McManus*, 151 Cal. 331; 90 Pac. 702; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389; 58 L. Ed. 1011, L. R. A. 1915 C, 1189, 34 Sup. Ct. Rep. 612; *Riley v. Chambers*, 8 A. L. R. 419; *Klene v. Marjorie Realty Co.*, 128 S. W. 980.

⁵⁴*Harry Gundling v. City of Chicago*, 177 U. S. 183, 44 Law Ed. 725. See page 54 of cases.

⁵⁵*Lieberman v. Van de Carr*, 19 U. S. 552.

ited to power and excludes policy⁵⁶, although it is to be noted that the courts have held that certain businesses are not by nature or circumstance such, that they are affected with a public interest, so that they are the proper subject of regulation on behalf of the public welfare, as, for example, cement contractors⁵⁷ and horse shoers.⁵⁸ There must, therefore, be a basic limitation on the power of the State legislatures in their selection of businesses as a proper subject of legislative restraint, regulation or prohibition. We submit the following as the proper basic limitation as laid down by the court decisions, to-wit: that a business in order to be properly subjected to regulatory legislation must be peculiarly susceptible to acts which are generally considered anti-social conduct and in addition the scope of the business must be large enough to endanger a considerable number of people. If a business fits within the above requirements it is then the proper subject of restriction or regulation, and this regardless of whether or not the public has a right to demand the service offered by the business.⁵⁹ Some of the businesses which the legislatures have seen fit to regulate by legislation are businesses which are thought to be peculiarly susceptible to these improper influences because a fiduciary relationship is involved, as for example, commission merchants, auctioneers, etc.; again in some businesses or professions the legislatures have seen fit to regulate them because one party in the transaction holds himself as having special knowledge or experience, as doctors, lawyers, accountants, dentists, etc.; again, in some businesses the legislature has seen fit to regulate them because the business has been the medium of considerable fraud, as brokers, bankers, commission men, food

⁵⁶Insurance Co. v. Kansas, 233 U. S. 389.

⁵⁷State ex rel. Sampson v. City of Sheridan, et al., 170 Pacific 1 Wyoming.
See page 55 of cases.

⁵⁸Edward Bessette v. The People of the State of Illinois, 193 Ill. 334.
See page 56 of cases.

⁵⁹Insurance Co. v. Kansas, 233 U. S. 389.

manufacturers, packing industries, auctioneers and peddlers.

We submit that real estate brokers and salesmen in their capacity as agents are fiduciaries and that all men are not worthy of the trust; that as appraisers they require special knowledge, but all men do not have that special knowledge, and that this business has suffered tremendously by countless frauds that have been perpetrated by the "fly by night" real estate man, for example, in the sale of worthless fruit lands in the Isle of Pines and Florida and timber lands in Arkansas; that therefore this then is a business that needs legislative attention and regulation, for every normal human being is interested in land and should be encouraged in that interest by the prospect of honest and well informed specialists. It is to be noted that thirteen of the State legislatures have thought that the real estate business is a business which is of public concern and that they have accordingly passed acts regulating the business of real estate brokers and real estate salesmen. We submit that so general a movement must have been founded in the conception that such regulation will advantage the general welfare.

It is also to be noted that conceding that the business is of a nature so as to be a proper subject of restraint as affecting the public welfare, the manner in which it accomplishes this must be legal⁶⁰, that is, the law which attempts to restrain this business must be so framed that when it is in practical operation it will not violate any of the fundamental personal and property rights of our citizens⁶¹ and that it will not offend the procedural requirements of a constitutional law.

The Fourteenth Amendment of our Federal Constitu-

⁶⁰Hall v. Geiger-Jones Co., 242 U. S. 539.

⁶¹Gundling v. Chicago, 177 U. S. 183-188.

tion has been one of the most active factors in restricting and limiting our State legislatures in the selection of the businesses and occupations which they may seek to restrain, regulate or prohibit through the clause which guarantees due process of law to the citizen. The due process of law clause is an essential limitation of the exercise of the police power in the selection of a business for restraint, regulation or prohibition, for in order to come within the constitutional requirements of the clause it must first be shown that any law when finally framed has been so drawn that when in operation it will not interfere with the inherited and inalienable rights of liberty, property and equality, and, second, that the procedural rights of the citizen have been protected.

Due process of law has a procedural and substantive law aspect. Its procedural aspect was the first phase which was developed, but recently the substantive side of this clause has received considerable attention. In its substantive aspect it is said to mean "Conformity to the settled maxims of free government."⁶² It has also been said that, unless the regulations are so utterly unreasonable and extravagant in their nature and purpose as to unnecessarily and arbitrarily interfere with or destroy the property and personal rights of the citizen, that they do not extend beyond the power of the State to pass legislation to deal with them as they see fit, and that otherwise they form no subject for federal interference.⁶³ In its procedural aspect it is said: "That any procedure giving notice and a hearing is valid."⁶⁴ It is true that the courts have consistently confessed their inability to form a general definition of this clause and they have adopted as their settled rule the policy of dealing with each case separately on its own facts, so that an exami-

⁶²E Parte Ah Fook, Cal. 402.

⁶³Gundling v. Chicago, 177 U. S. 183-188.

⁶⁴Simon v. Craft, 182 U. S. 427.

nation of any number of cases will merely show different phases of the application of the principle. See pages .. to .. inclusive for cases.

Respectfully submitted,

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IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1922.

R. W. BRATTON, et al.,	Appellants,
vs.	
WILLIAM C. CHANDLER, et al.,	Appellees.

**BRIEF ON THE POWER OF THE STATE TO REGU-
LATE THE REAL ESTATE BUSINESS, FOR
ORAL ARGUMENT.**

by
NATHAN WILLIAM MacCHESNEY

“The Kentucky Statute, approved February 21, 1874, regulating the inspection and gauging of oils and fluids, is a mere police regulation within the power of the State, and does not contravene the Federal Constitution.”

E. E. Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115.

In the case, *supra*, on page 1116, 24 L. Ed., the court was of the opinion that:

“The statute provides that such oils and fluids, by whatever name called and wherever manufactured, which may or can be used for illuminating purposes, shall be inspected by an authorized state officer, before being used, sold, or offered for sale. Such as ignite or permanently burn at a temperature of 130 degrees Fahrenheit and upwards, are recog-

nized by the statute as standard oils, while those which ignite or permanently burn at a less temperature are condemned as unsafe for illuminating purposes. Inspectors are required to brand casks and barrels with the words 'standard oil,' or with the words 'unsafe for illuminating purposes,' as inspection may show to be proper."

* * * * *

"The plaintiff in error claims that, as assignee of the patentee, she had the right to sell the Aurora oil in any part of the United States, and that no State could, consistently with the Federal Constitution and the laws of Congress, prevent or obstruct the exercise of that right, either by express words of prohibition, or by regulations which prescribed tests to which the patented article could not be made to conform."

* * * * *

"It is true that letters patent, pursuing the words of the statute, do, in terms grant to the inventor, his heirs and assigns, the exclusive right to make, use and vend to others his invention or discovery, throughout the United States and the Territories thereof. But, obviously, this right is not granted or secured, without reference to the general powers which the several states of the Union unquestionably possess in reference to their purely domestic affairs, whether of internal commerce or of police. 'In the American constitutional system,' says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government.' Cooley, Const. Lim. 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the states must observe in its exercise, the existence of such a power in the states has been uniformly recognized in this court."

* * *

"By the settled doctrines of this court, the police power extends at least, to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense

of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by necessary implication, to the National Government. The Kentucky Statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citizens. It expresses in the most solemn form the deliberate judgment of the State that burning fluids which ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes. Whether the policy thus pursued by the State is wise or unwise, it is not the province of the national authorities to determine. That belongs to each State, under its own sense of duty, and in view of the provisions of its own Constitution."

On page 1117 in the case, *supra*, 24 L. Ed., the court stated:

"We are of opinion that the right conferred upon the patentee and his assigns to use and vend the corporal thing or article, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations which the State has established by the Statute of 1874."

* * * * *

"This court has never hesitated, by the most rigid rules of construction to guard the commercial power of Congress against encroachment in the form or under the guise of state regulations established for the purpose and with the effect of destroying or impairing rights secured by the Federal Constitution. It has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations enacted in good faith, and which had appropriate and direct connection with that protection of life, health and property, which each State owes to its citizens.

The ordinance of the City and County of San Francisco, prohibiting the carrying on of public laundries and wash houses within certain prescribed limits of the city and county, from ten o'clock at

night until six o'clock in the morning, is purely a police regulation within the competency of any municipality, possessed of the ordinary powers, to make. * * * The 14th Amendment of the U. S. Constitution is not designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people."

Francis Barbier v. Patrick Connolly, 113 U. S. 27, 28 L. Ed. 923.

Also, in the case, *supra*, on page 925, 28 L. Ed., the court said:

"From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions."

"The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State. In the case before us, the provisions requiring certificates from the health officer and the board of fire wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome, but, as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not a violation of any substantial right of the individual.

An ordinance adopted under legislative authority by an inland town containing less than 6,000 inhabitants, by which the owners of property abutting upon any street along which sewer mains had been laid were required to install water-closets in their houses, and connect the same with the main sewer pipe within thirty days from the passage of the ordinance, under penalty of fine and imprisonment for non-compliance, is a valid exercise of the police power."

Sarah M. Hutchinson v. City of Valdosta, 227 U. S. 303, 57 Law Ed. 520.

On page 523, 57 L. Ed., in the case, *supra*, the court said:

"It is the commonest exercise of the police power of a state or city to provide for a system of sewers, and to compel property owners to connect therewith.

As stated in *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620, 11 Sup. Ct. Rep. 13, 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.'"

"A state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States."

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989.

On page 992, 24 L. Ed., in the case *supra*, the court said:

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are subject to the police power of the State.

We do not mean to say that property actually in

existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. Ed. 929, was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooved it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The Legislature had no power to confer any such rights.

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as to the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama* (*ante*, 302).

Since we have already held, in the case of *Bartemeyer v. Iowa*, that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts."

In the case of *Ex parte Tuttle*, 91 Cal. 589, it is said:

“Any practice or business, the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, is a legitimate subject for *regulation* or prohibition by the State; and that gambling, in the various modes in which it is practiced, is thus demoralizing in its tendencies, and therefore an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure, is no longer an open question. The measures needful or appropriate to be taken in the exercise of this police power are determined by legislative policy, and for this purpose a wide discretion is committed to the law-making body. Whether it shall entirely prohibit, or only *regulate* by confining such practices within prescribed limits; whether the law shall apply to every kind of gambling, or only to those games or wagers in which evil effects appear with greatest prominence, must be determined primarily by the legislative department of the State, or of the municipality authorized to exercise this great power, which is conferred for the purpose of securing the public safety and welfare; and unless it clearly appears that a statute or ordinance ostensibly enacted for this purpose has no real or substantial relation to these objects, and that the fundamental rights of the citizen are assailed under the guise of a police regulation, the action of that department is conclusive.”

The public welfare justifies the regulation of any business likely to harm the public, so long as that regulation is reasonably connected with the purpose of the act, and it is the function of the legislature exclusively to determine the need of the regulation.

Hall v. Geiger-Jones Co. and Merrick v. N. W. Halsey & Co., *supra*; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011, L. R. A. 1915C, 1189, 34 Sup. Ct. Rep. 612;

Engel v. O'Malley, 219 U. S. 128, 55 L. Ed. 128, 31 Sup. Ct. Rep. 612; and others.

Riley v. Chambers,
8 A. L. R. 419.

The Court of Appeals of New York in *Budd v. The People of the State of New York*, 117 N. Y. 1 (cited in 143 U. S. 517, 36 Law Ed. 247, on page 252 thereof) said:

“that the criticism to which the case of *Munn v. Illinois* had been subjected proceeded mainly upon a limited and strict construction and definition of the police power; that there was little reason, under our system of government, for placing a close and narrow interpretation on the police power, or restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society and the new circumstances as they arise calling for legislative intervention in the public interest; and that no serious invasion of constitutional guarantees by the Legislature could withstand for a long time the searching influence of public opinion, which was sure to come sooner or later to the side of law, order and justice, however it might have been swayed for a time by passion or prejudice, or whatever aberrations might have marked its course.”

In the case of the *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 558, 58 L. Ed. 721, 726, 34 Sup. Ct. Rep. 364, the court said:

“It is settled that neither the ‘contract’ clause nor the ‘due process’ clause has the effect of overriding the power of the state to establish all regulations and are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.”

“The Act of June 18, 1883, requiring the operators of butter and cheese factories on the co-operative plan to give bonds, etc., is not in contravention of

Section 6, Article 2, of the Bill of Rights, which declares that 'the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall be inviolate.' Such act is but a proper exercise of the police power of the State for the protection of persons intrusting their property to the manufacturer, from fraud and wrong."

George E. Hawthorne et al. v. The People of the State of Illinois, 109 Ill. 302.

The court in the case *supra*, on page 311, said:

"It is said that this is not a police regulation. That may be true, if the term were confined merely to the protection of the health and morals of the people. The term has a much more comprehensive meaning. It has been defined to be: 'The regulation and government of a country or city, so far as it regards its inhabitants.' Also, 'The laws, ordinances and other measures which require the citizens to exercise their rights in a particular form.' It is true there are other and more limited meanings of the word, and when it is said that there are other limits to its exercise than the constitution, it has reference to the more restricted meaning of the term. When exercised by the legislature, in its more comprehensive sense, in the passage of laws for the protection of life, liberty and property, or laws for the general welfare, the only limitations to restrain its action must be found in the constitution. This, in the larger sense, is an exercise of the police power by the General Assembly, and falls fully within legislative power, and sustains the enactment under consideration."

In the case in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 567, 55 L. Ed. 338, 31 Sup. Ct. Rep. 259, it is said:

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty

implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

"We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 292, 43 L. Ed. 702, 704, 19 Sup. Ct. Rep. 465; *Gilman v. Philadelphia*, 3 Wall. 713, 729, 18 L. Ed. 96, 100; *Pound v. Turck*, 95 U. S. 459, 464, 24 L. Ed. 525, 527; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 470, 24 L. Ed. 529. And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose. Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same. This power, as said in *Carthage v. Frederick*, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480, has always been exercised by municipal corporations, 'by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities.'"

Chicago B. & Q. R. Co. v. Illinois ex rel. Greenwood, 200 U. S. 592, 50 L. Ed. 609.

"A state may, when exercising its police power, consider the relation of rights, and accommodate their co-existence, and, in the interest of the community, limit one right that others may be enjoyed."

William L. Wassa v. Midland Carbon Company,
65 Law Edition 134.

"The legislature is fully authorized by the consti-

tution to confer power, by general law, upon incorporated cities to demand and collect a license fee or tax of all persons who shall pursue the business or calling of brokers within their limits, and to prohibit within such limits the business of a money-changer, or banker, broker or commission merchant, including that of merchandise, produce or grain broker, real estate broker, and insurance broker, without license therefor; and such a provision in the charter of a city, and an ordinance in pursuance thereof, are not in conflict with any constitutional provision."

George P. Braun et al. v. City of Chicago, 110 Ill. 186.

The court in the case *supra*, on page 195, said:

"It is also insisted that if this is a police regulation, it cannot be applied to any but immoral vocations, or such as are injurious to the well being of society. The term 'police power of the State,' is used in different senses. In its broadest and most unlimited sense it embraces all laws or regulations for the well being or government of the people. In its most limited sense it is used to express the power of preservation of the health or safety of the people by depriving persons of liberty, or to destroy private property, in despite of constitutional limitations, in great and pressing emergencies, to prevent the spread of contagious diseases, or other great calamities to the people or their property."

"The limitation to grain and hay which is made by Mo. Laws 1913, p. 372, Section 63, as amended by Laws 1915, p. 302, requiring that such products, when received in or discharged from public warehouses, shall be weighed by public weighers where there are such, and that no one else shall issue certificates or make charges for weighing under such circumstances, does not render the statute invalid as an unconstitutional discrimination against the members of an incorporated board of trade which maintains a private weighing bureau."

Merchants Exchange of St. Louis v. State of Mo., at the relation of John T. Barker, 248 U. S. 300, 63 L. Ed. 300.

The court in the case *supra*, on page 306, stated that:

"The regulation of weights and measures with a view to preventing fraud and facilitating commercial transactions is an exercise of the police power. To require that goods received in or discharged from public warehouses shall be weighed by public weighers, and that no one else shall issue certificates of or make charges for weighing under those circumstances, is not an unreasonable or arbitrary exercise of the discretion vested in the legislature. *Compare House v. Mayes, supra; Brodnax v. Missouri*, 219 U. S. 285, 55 L. Ed. 219, 31 Sup. Ct. Rep. 238. Nor can we say that to limit the application of the provision to grain and hay is an arbitrary discrimination against dealers in those articles. The fact that respondent is a corporation does not lessen the scope of the State's police power."

"Statute enacted for the prevention of fraud, and which have a fair, just and reasonable relation to the preservation of lives, health, morals and general welfare of the public, do not contravene the constitutional provisions against the abridgment of the rights of persons to contract and against the deprivation of their liberty and property without due process of law, although they may interfere to some extent with individual liberty and the free use and enjoyment of private property.

A statute (Acts 1905, Ch. 482) whose object is the prevention of fraud in the sale of corn meal in packages, purporting expressly or by implication, to contain certain weights and measures for which the purchaser is charged, when in fact they contain less quantities, is authorized under the police powers of the state."

State v. Mill Co. et al., 123 Tenn. 399.

Neas v. Borches, 109 Tenn. 398.

People v. Girard, 145 N. Y. 105.

People v. Lurks, 195 N. Y. 377.

People v. Wagner, 86 Mich. 594.

Squire v. Tellier, 185 Mass. 18.

State v. Campbell, 64 N. H. 402.

State v. Fourcade, 45 La. Ann. 717.

Butler v. Chambers, 36 Minn. 69.

Waterbury v. Newton, 50 N. J. Law 534.

Lemieux v. Yoring, 211 U. S. 489.

People v. Bottling Works, 168 N. Y. Suppl. 570.

"The business of renting dwelling houses is a matter so affected with public interest that it may be regulated under the police power of the state, and such regulation may include the fixing of rents in times of abnormal stress, since the *fixing of the price of necessities is a long established exercise of the police power.*"

Marcus Brown Holding Co. v. Feldman et al.,
269 Fed. 307.

The court in the case *supra*, on page 315, 269 Fed., said:

"It cannot be too often said that a constitution is not a code nor a statute, that it declares only fundamental principles, and is not 'to be interpreted with the strictness of a private contract.' Legal Tender Cases, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204. To this doctrine we owe the rulings that even the contract clause of the constitution does not override the power of the state to establish regulations reasonably necessary to secure the health, comfort, or general welfare of the community—that is, to exercise the police power of the state (*Atlantic, etc., Co. v. Goldsboro*, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721); that in like manner 'reasonable restraints' may be placed upon freedom of contract (*Rail & River Co. v. Ohio, etc., Comm'n.*, 236 U. S. 338, 35 Sup. Ct. 359, 59 L. Ed. 607); and that a legislature may make police regulations, although they interfere with the full enjoyment of private property, and no compensation be given. (*Chicago, etc., Co. v. Drainage Comm'n.*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175.) Such decisions (and we cite but few of many) reduce the question to this: Are these statutes an exercise of police power reasonably suitable for combating or lessening the evil proved, and therefore constitu-

tional, although at other times and under other circumstances they might plainly be obnoxious to fundamental principles of constitutional government?"

The court also said in the case *supra*, on page 316, 269 Fed., that:

"In and by these decisions the doctrine of property devoted to a public use became the doctrine of property affected with a public use, even when (as in the North Dakota case) the elevator owner really wished to, and actually did, confine his storage facilities to grain he had himself bought and desired himself to sell again. Cf. dissenting opinion of Brewer, J. The step from property affected by a public interest (*i. e.*, fire insurance) was taken in *German Alliance, etc., Co. v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189), and it must be now accepted on that authority as an 'underlying principle that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulations.'

Since this pronouncement, and its legitimate and logical sequel, the 'trading stamp' case (*Rast v. Van Deman*, 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455), it may be and has been asserted that any business is affected with a public interest as soon as the electorate become sufficiently interested in it to pass a regulatory statute. It is not necessary to go so far, but we must and do hold that the business of renting out living space is quite as suitable for statutory regulation, and as much affected with a public interest, as fire insurance and trading stamps. It is easy to multiply quotations as to the inviolability of private business. It is singular how uniformly they come from decisions holding some business open to intimate regulation, while saying that, if such business were only private, it could not be regulated; but never is 'private business' defined. It is another of those phrases which is left to a process of 'inclusion and exclusion,' which really means a finding of facts."

In the cases of *Edgar A. Levy Leasing Company, Inc.*,

v. *Jerome Siegel* (No. 285), and 810 *West End Avenue, Inc.*, v. *Henry R. Stern* (No. 287), consolidated in the Supreme Court and reported in the 66th Law Edition 326, the facts are respectively as follows:

"In error to the Supreme Court of the State of New York in and for the County of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which affirmed an order of the Appellate Division of the Supreme Court, First Judicial Department, affirming an order of a special term of the Supreme Court, denying a motion by plaintiff for judgment upon the pleadings in an action for rent. Affirmed. Also:

In error to the Supreme Court of the State of New York in and for the County of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which, reversing an order of the Appellate Division of the Supreme Court, First Judicial Department, affirmed an order of a special term of the Supreme Court, denying a motion by plaintiff for judgment on the pleadings in an action in ejectment. Affirmed.

In No. 285 it is alleged, that a described apartment was leased to the defendant from October 1, 1918, to October 1, 1920, at the stipulated rental of \$1,450 per annum, payable in equal monthly instalments in advance; that while in possession under that lease, in June, 1920, the defendant executed a new lease for two years, beginning on the expiration of the former one on October 1, 1920, at a rental increased to \$2,160, payable in equal monthly instalments in advance; and that he refuses to pay the instalment due on October 1, 1920. Judgment for the one month's rent is prayed for.

The defendant admits the execution of the leases, as stated in the complaint, but avers that the second one was signed under the coercion and duress of threats of eviction, and that the rent stipulated for is 'unjust, unreasonable and oppressive.' He offers to pay the same amount of rent as was paid for the preceding month, and asserts the right to continue in possession under the Emergency Acts. A motion for judgment on the pleadings presented the question of the constitutionality of chapter 944 of the

Emergency Housing Laws, and the state courts all held the chapter a constitutional and valid exercise of the police power.

In No. 287 it is averred, that the defendant is a tenant holding over after expiration of his lease; that he refuses to surrender possession, as he stipulated in his lease to do, and that he claims the right to retain possession under chapters 942 and 947 of the Emergency Housing Laws, which suspend the right of action to recover possession except under specified conditions, which are not applicable. A general demurrer to this complaint presented the question of the constitutionality of chapters 942 and 947 of the laws assailed, and the state courts all sustained them as valid.

In terms the acts involved are 'emergency' statutes, and, designed, as they were, by the legislature, to promote the health, morality, comfort and peace of the people of the state, they are obviously a resort to the police power to promote the public welfare. They are a consistent interrelated group of acts essential to accomplish their professed purposes. The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the state a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort and even to the peace of a large part of the people of the state. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it, cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual, basis and justification for exercise of that power.

If this court were disposed, as it is not, to ignore the notorious fact that a grave social problem has arisen from the insufficient supply of dwellings in all large cities of this and other countries, resulting from the cessation of building activities, incident to the war, nevertheless, these reports and the very

great respect which courts must give to the legislative declaration than an emergency existed would be amply sufficient to sustain an appropriate resort to the police power for the purpose of dealing with it in the public interest.

It is strenuously argued, as it was in *Block v. Hirsh*, 256 U. S. 135, 65 L. Ed. . . . , 16 A. L. R. 165, 41 Sup. Ct. Rep. 458, and in the *Marcus Brown Co.* case, *supra*, that the relation of landlord and tenant is a private one, and is not so affected by a public interest as to render it subject to regulation by the exercise of the police power.

It is not necessary to discuss this contention at length, for so early as 1906, when the constitutionality of the Tenement House Act of New York, enacted in 1901, was assailed as an unconstitutional interference with the right of property in land, on substantially all of the grounds urged against the Emergency Housing Laws, this court, in a *per curiam* opinion, affirmed a decree of the Court of Appeals of New York (179 N. Y. 325, 70 L. R. A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 Ann. Cas. 439), sustaining regulations requiring large expenditures by landlords as a valid exercise of the police power.

These authorities show that, from time to time, for a generation, as occasion arose, this court has held that there is no such inherent difference in property in land, from that in tangible and intangible personal property, as exempts it from the operation of the police power in appropriate cases, and in both the *Marcus Brown* and *Block* cases, *supra*, it was held, in terms, that the existing circumstances clothed the letting of buildings for dwelling purposes with a public interest sufficient to justify restricting property rights in them to the extent provided for in the laws in those cases objected to.

It results that the judgments of the state court must be affirmed."

"The power of the state by appropriate legislation to provide for the public convenience stands upon the same grounds as its power by appropriate

legislation to protect the public health, the public morals, or the public safety.

The Ohio statute (Ohio Laws 1889, p. 291, Rev. Stat. 1890, section 3220), requiring each railroad company whose road is operated within the state to cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village containing over 3,000 inhabitants, long enough to receive and let off passengers, is for the public convenience, and is not a regulation of interstate commerce and unconstitutional when applied to the trains of a corporation of the state engaged in such commerce."

Lake Shore & Michigan Southern Railway Co. v. State of Ohio, ex rel. Geo. L. Lawrence, 173 U. S. 285, 43 L. Ed. 702.

In the case *supra*, on page 706, 43 L. Ed., it is said:

"Now, it is evident that these cases had no reference to the health, morals, or safety of the people of the state, but only to the public convenience. They recognized the fundamental principle that, outside of the field directly occupied by the general government under the powers granted to it by the constitution, all questions arising within a state that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the state, and that its legislative enactments, relating to those subjects, and which are not inconsistent with the state constitution, are to be respected and enforced in the courts of the union if they do not by their operation directly entrench upon the authority of the United States or violate some right protected by the national constitution. The power here referred to is, to use the words of Chief Justice Shaw, the power 'to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same.' (*Com. v. Alger*, 7 Cush. 53, 85.) Mr. Cooley well said: 'It cannot be doubted that there is ample power in the legislative depart-

ment of the state to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition.' Cooley's Const. Lim., 6th Ed. p. 715. It may be that such legislation is not within the 'police power' of a state, as those words have been sometimes, although, inaccurately, used. But in our opinion the power, whether called police, governmental or legislative, exists in each state, by appropriate enactments not forbidden by its own constitution or by the constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the states is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended."

Lake Shore & Michigan Southern Railway Co. v. State of Ohio ex rel. Geo. L. Lawrence, 173 U. S. 296, 43 L. Ed. 706-707.

"A state possesses the power to remedy the confusion and uncertainty as to registered titles to land, arising from the loss or destruction of public records by flood, fire or earthquake."

American Land Company v. Louis Zeiss, 219 U. S. 47, 55 L. Ed. 82.

In the case *supra*, on page 94, 55 L. Ed., the court stated:

"As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government. This being true, it follows that government possesses the power to remedy the confusion and uncertainty as to registered titles arising from a disaster like that described by the court below."

“A state statute limiting the period of employment of workmen in underground mines, or in the smelting, reduction, or refining of ores or metals, to eight hours per day, and making its violation a misdemeanor, is a valid exercise of the police power of the state.”

Albert F. Holden v. Harvey Hardy, 169 U. S. 366, 42 L. Ed. 780.

On page 791, 42 L. Ed., the court further said:

“While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the constitution, for the protection of the operatives, but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies and to secure the safety of persons peculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes for hotels, theaters, factories, and other large buildings, a municipal inspection of boilers, and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, for the guarding of well holes, stairways, elevator shafts, and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signaling the surface, for the supply of

fresh air and the elimination, as far as possible, of dangerous gases, for safe means of hoisting and lowering cages, for a limitation upon the number of persons permitted to enter a cage, that cages shall be covered, and that there shall be fences and gates around the top of shafts, besides other similar precautions."

Also, on page 792, 42 L. Ed., the court said:

"These statutes have been repeatedly enforced by the courts of the several states; their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional."

"But if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the state that the public health should be preserved as that life should be made secure. With this end in view quarantine laws have been enacted, in most if not all the states; insane asylums, public hospitals and institutions for the care and education of the blind established, and special measures taken for the exclusion of infected cattle, rags, and decayed fruit. In other states laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the states, they have been generally upheld. Thus, in the case of *Commonwealth v. Hamilton Manufacturing Co.*, 120 Mass. 383, it was held that a statute prohibiting the employment of all persons under the age of 18, and of all women laboring in any manufacturing establishment more than 60 hours per week, violates no contract of the commonwealth implied in the granting of a charter to a manufacturing company nor any right reserved under the constitution to any individual citizen, and may be maintained as a health or police regulation.

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the state."

In the case of *Armour & Co. v. North Dakota*, 240 U. S. 510, 60 Law Ed. 771, on page 774, the court states:

“The Supreme Court considered the statute as but a development of other laws passed in the exercise of the police power of the state to secure to its inhabitants pure food and honest weights, questions which the court thought were ‘inseparably allied and any argument advanced upon one applies equally to the other.’ And the court said the law was drafted by the Pure Food Commission, it might be reasonably assumed, ‘after 12 years of observation and study,’ and, further, that ‘the expert who drafted the law, the legislature who passed it, and the governor who approved it, all thought necessity existed for such a measure. If we did not agree with all those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this court believes the law not only reasonable, but necessary, and this belief is founded upon the evidence in this case and upon facts of which this court can take judicial cognizance.’

The court by these remarks, expressed the test of a judicial review of legislation enacted in the exercise of the police power, and in view of very recent decisions it is hardly necessary to enlarge upon it. We said but a few days ago that if a belief of evils is not arbitrary, we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury, but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws. *Rast v. Van Deman & L. Co.*, 240 U. S. 342, *ante*, 679, 36 Sup. Ct. Rep. 370; *Tanner v. Little*, 240 U. S. 369, *ante*, 691, 36 Sup. Ct. Rep. 379.”

“The delivery for shipment in interstate commerce of citrus fruits which are immature and unfit for consumption may, until Congress exercises its supreme authority over the subject, be made a criminal offense, as is done by Fla. Laws 1911, chap. 6236, such legislation being a valid exercise of the

police power of the state, and only incidentally and indirectly affecting interstate commerce."

S. J. Sligh v. James A. Kirkwood, 237 U. S. 52, 59 L. Ed. 835.

In the case *supra*, on page 838, 59 L. Ed., the court said:

"At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the state, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the state. *New York v. Miln*, 11 Pet. 102, 139, 9 L. Ed. 648, 662. The police power, in its broadest sense, includes all legislation and almost every function of civil government. *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. *Camfield v. United States*, 167 U. S. 518, 524, 42 L. Ed. 260, 262, 17 Sup. Ct. Rep. 864. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. *Chicago B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 592, 50 L. Ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175. In one of the latest utterances of this court upon the subject, it was said: 'Whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. * * * And further, "It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."' *Eubank v. Richmond*, 226 U. S. 137, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192.

The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established."

"*Munn v. Illinois*, 94 U. S. 113 (cited in 233 U. S. 389, 58 Law Ed. 1020), is an instructive example of legislative power exerted in the public interest. The constitution of Illinois declared all elevators or storehouses, where grain or other property was stored for a compensation, to be public warehouses, and a law was subsequently enacted fixing rates of storage. In other words, that which had been private property had from its uses become, it was declared, of public concern and the compensation to be charged for its use prescribed. The law was sustained against the contention that it deprived the owners of the warehouses of their property without due process of law. We can only cite the case and state its principle, not review it at any length. The principle was expressed to be, quoting Lord Chief Justice Hale, 'that when private property is *affected with a public interest*, it ceases to be *juris privati* only' and it becomes 'clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large;' and, so using it the owner 'grants to the public and interest in that use, and must submit to be controlled by the public for the common good.' And it was said that the application of the principle could not be denied because no precedent could be found for a statute precisely like the one reviewed. It presented a case, the court further said, 'for the application of a long known and well-established principle in social science, and this statute simply extends the law so as to meet this new development to commercial progress.' The principle was expressed as to property, and the instance of its application was to property but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest."

"In *Brass v. North Dakota*, 153 U. S. 391 (cited in 233 U. S. 309, 58 Law Ed. 1021), a law of the State

of North Dakota was sustained which made all buildings, elevators, and warehouses used for the handling of grain for a profit public warehouses, and fixed a storage rate. The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it, that to justify regulation of a business the business must have a monopolistic character. That distinction was pressed and answered. It was argued, the court said, 'that the statutes of Illinois and New York (passed on the Munn and Budd cases) are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the State of North Dakota and the small population of its country towns and villages are said to present no such opportunities.' And it was also urged that the method of carrying on business in North Dakota and the eastern cities was different, that the elevators in the latter were essentially means of transporting grain from the lakes to the railroads, and those who owned them could, if uncontrolled by law, extort such charges as they pleased, and stress was laid upon the expression in the other cases which represented the business as a practical monopoly. A contrast was made between those conditions and those which existed in an agricultural state where land was cheap and limitless in quantity. It was replied that this difference in conditions was 'for those who make, not for those who interpret, the laws.' And considering the expressions in the other cases which, it was said, went rather to the expediency of the laws than to their validity, yet, it was further said, the expressions had their value because the 'obvious aim of the reasoning that prevailed was to show that the subject matter of these enactments fell within the legitimate sphere of legislative power, and that so far as the laws and constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law.'"

"A provision of the sanitary code of the City of

New York which is construed by the state courts to confer discretionary power on the board of health, within reasonable limits, to grant or withhold permits to sell milk in that city, cannot be deemed to be lacking in the due process of law guaranteed by the 14th Amendment to the Federal Constitution, in the absence of any showing of arbitrary or oppressive exercise of such power."

"Singling out the milk business in the City of New York as a proper subject for regulation does not deny the equal protection of the laws, where all milk dealers in the city are equally affected by such regulation."

People of the State of New York, ex rel. Simon Lieberman v. John E. Van De Carr. 199 U. S. 552, 50 Law Ed. 305.

In the case *supra* on page 557, 50 Law. Ed., the court said:

"The right of the state to regulate certain occupations which may become unsafe or dangerous when unrestrained, in the exercise of the police power, with a view to protect the public health and welfare, has been so often and so recently before this court that it is only necessary to refer to some of the cases which sustain the proposition that the state has a right, by reasonable regulations, to protect the public health and safety. * * * It is primarily for the state to select the kinds of business which shall be the subject of regulation, and if the business affected is one which may be properly the subject of such legislation, it is no valid objection that similar regulations are not imposed upon other business of a different kind. *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145, 5 Sup. Ct. Rep. 736; *Fischer v. St. Louis*, 194 U. S. 361, 48 L. Ed. 1018, 24 Sup. Ct. Rep. 673."

"The business of insurance being affected with a public interest, those who, like insurance brokers, are engaged in that business or in bringing about its consummation, are affected with the same interest

and are subject to the same regulating power of the state."

Philip La Tourette v. Fitz Hugh McMaster, as Ins. Commissioner of the State of S. C., 248 U. S. 465, 63 L. Ed. 362.

On page 364, 63 L. Ed., in the case *supra*, it is stated:

"This contention depends upon the character of the business of insurance, and it was decided in *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011, L. R. A. 1915(1), 1198, 34 Sup. Ct. Rep. 612, to be clothed with a public interest, and subject, therefore, to the regulating power of the state. And it necessarily follows that, as insurance is affected with a public interest, those engaged in it or who bring about its consummation are affected with the same interest and subject to regulation as it is. A broker is so engaged,—is an instrument of such consummation. The statute makes him the representative of the insured. He is also the representative of the insurer (*Hooper v. California*, 155 U. S. 648, 657, 39 L. Ed. 297, 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207), and his fidelity to both may be the concern of the state to secure. As said by the Supreme Court of the state: 'It is important for the protection of the interests of the people of the state that the business should be in the hands of competent and trustworthy persons.' (104 S. C. 504, 89 S. E. 398.) And we may say that this result can be more confidently and completely secured through resident brokers, they being immediately under the inspection of the commissioner of insurance. The motive of the statute, therefore, is benefit to insurer and insured, and the means it provides seems to be appropriate."

"A business may be so far affected with a public interest as to permit legislative regulation of its rates and charges, although no public trust is imposed upon the property, and *although the public may not have a legal right to demand and receive service.*"

"The business of fire insurance is so far affected

with a public interest as to justify legislative regulation of its rates.”

German Alliance Insurance Company v. Ike Lewis, 233 U. S. 389, 58 Law. Ed. 1011.

“A state may require good character as a condition of the practice of medicine, and may rightfully determine what shall be the evidences of that character.”

Benjamin Hawker v. People of the State of New York, 170 U. S. 189, 42 L. Ed. 1002.

The court on page 1004, 42 L. Ed., stated:

“No precise limits have been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting, not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. In *Dent v. West Virginia*, 129 U. S. 114, 122 (32:623, 626), it was said in respect to the qualifications of a physician: ‘The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud.’

We note also these further declarations from state courts. In *State (Powell) v. State Medical Examining Board*, 32 Minn. 324, 327, 50 Am. Rep. 575, it was said: ‘But the legislature has surely the same power to require, as a condition of the right to prac-

tice this profession, that the practitioner shall be possessed of the qualifications of honor and a good moral character, as it has to require that he shall be learned in the profession. It cannot be doubted that the legislature has authority, in the exercise of its general police power, to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them unfit to be intrusted with the discharge of its duties.' In *Thompson v. Hazen*, 25 Me. 104, 108: 'Its authors were careful that human health and life should not be exposed without some restraint, by being committed to the charge of the unprincipled and vicious. * * * It could not have been intended that persons destitute of the moral qualification required should have full opportunity to enter professionally the families of the worthy, but unsuspecting, and be admitted to the secrets which the sick chamber must often intrust to them.' In *State v. Hathaway*, 115 Mo. 36, 47: 'The legislature then in the interest of society and to prevent the imposition of quacks, adventurers, and charlatans upon the ignorant and credulous, has the power to prescribe the qualifications of those whom the state permits to practice medicine. * * *

And the objection now made that because this law vests in this board the power to examine, not only into the literary and technical acquirements of the applicant, but also into his moral character, it is a grant of judicial power, is without force.' In *Eastman v. State*, 109 Ind. 278, 279 (58 Am. Rep. 400): 'It is, no one can doubt, of high importance to the community that health, limb and life should not be left to the treatment of ignorant pretenders and charlatans. It is within the power of the legislature to enact such laws as will protect the people from ignorant pretenders, and secure them the services of reputable, skilled and learned men.' In *State v. Call*, 121 N. C. 646, 28 S. E. 517: 'To require this is an exercise of the police power for the protection of the public against incompetents and imposters, and is in no sense the creation of a monopoly of special privileges. The door stands open to all who possess the requisite age and good character, and can stand the examination which is exacted of all applicants alike.'

But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test."

"A statute of a state, which requires every practitioner of medicine in it to obtain a certificate from the state board of health that he is a graduate of a reputable medical college, and which makes the practice of medicine by any person without such certificate a misdemeanor, punishable by fine or imprisonment, is not unconstitutional and void under the Fourteenth Amendment, which declares that no state shall deprive any person of life, liberty or property without due process of law."

Frank M. Dent v. The State of West Virginia,
129 U. S. 114, 32 Law. Ed. 623-624.

In the case *supra* on page 625, 32 Law. Ed., the court said:

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the pro-

tection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

"Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable by usual modes adapted to the nature of the case."

Frank M. Dent v. The State of West Virginia,
129 U. S. 114, 32 L. Ed. 624.

On page 626 in the case *supra*, 32 L. Ed., the court was of the opinion that:

"As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent de-

rived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.' In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters, that is, by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen. As said by this court in *Yick Wo v. Hopkins*, speaking by Mr. Justice Matthews: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' 118 U. S. 356, 369, (30:220, 226); see also *Pennoyer v. Neff*, 95 U. S. 714, 733 (24:565, 572); *Davidson v. N. O.*, 96 U. S. 97, 104, 107 (24: 616, 619, 620); *Hurtado v. Cal.*, 110 U. S. 516 (28: 232); *Mo. Pac. R. Co. v. Humes*, 115 U. S. 512, 519 (29: 463, 465.)

There is nothing of an arbitrary character in the provisions of the statute in question; it applies to all physicians, except those who may be called for a special case from another state; it imposes no conditions which cannot be readily met; and it is made enforceable in the mode usual in kindred matters, that is, by regular proceedings adapted to the case. It authorizes an examination of the applicant by the board of health as to his qualifications when he has no evidence of them in the diploma of a reputable

medical college in the school of medicine to which he belongs, or has not practiced in the state a designated period before March, 1881. If, in the proceedings under the statute, there should be any unfair or unjust action on the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the state. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the board after it had decided that the diploma he presented was insufficient."

"Municipal ordinances which subject the business of a private detective or detective agency to police supervision, and provide that no person shall carry on such business without first being recommended by the board of police commissioners and taking the oath of a city detective and giving a bond, do not offend against the due process of law and equal protection of the law clauses of U. S. Const. 14th Amend., but are valid exercises of the police power."

Dan S. Lehon v. City of Atlanta, 242 U. S. 590, 61 L. Ed. 145.

The court further states in its opinion on page 149, 61 L. Ed., as follows:

"The only question for our decision is the validity of the law, and of that we have no doubt. Nor are we disposed to take much time in its discussion, notwithstanding the earnest argument of plaintiff in error. The extent of the police power of the state has been too recently explained to need further enunciation. The present case is easily within its principle. It would be very commonplace to say that the exercise of police power is one of the necessary activities of government, and all that pertains to it may be subjected to regulation and surveillance as a precaution against perversion. The Atlanta ordinances do no more. They provide in effect that all who engage in it or are connected with it as a business shall have the sanction of the state, have the stamp of the state as to fitness and character, take an oath to the state for faithful execution of its duties, and give a bond for their sanction. This the state may do

against its own citizens and may do against a citizen of Louisiana, which plaintiff in error is, or against a citizen of any other state."

"The business of receiving deposits of money in small sums from time to time until they reach an amount sufficient to be sent to other states or foreign countries is banking, and as such is a proper subject for regulation in the exercise of the police power of the state."

Engel v. O'Malley, 219 U. S. 128, 55 Law. Ed. 128.

In the case *supra* on page 136, 55 Law. Ed., the court in its opinion stated:

"Experience has shown that the protection of such depositors against fraud, which is the purpose running through the statute, is especially needed by at least that class of them with whom the persons hit by the statute largely deal. The case cited establishes that the state may regulate that business, and may take strong measures to render it secure. It also establishes that the plaintiff has no such constitutional right to carry it on at will as to raise him above state laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious in discrimination. The quasi paternal relations shown in argument and by documents to exist between those following the plaintiff's calling and newly-arrived immigrants justifies a supervision more paternal than is needed in ordinary affairs. Whether the court thinks them wise or not, such laws are within the scope of the discretion which belongs to legislatures and which it is usual for them to exert."

"The police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe."

Noble State Bank v. Haskell et al., 219 U. S. 104, 55 Law. Ed. 112.

The court in its opinion in the case *supra* on page 116 of 55 Law. Ed., states:

"It may be said in a general way that the police

power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. Ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In the case of *Joseph J. Smith v. State of Alabama*, 124 U. S. 465, 31 Law. Ed. 508, on page 512, the court stated:

"It requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed nor prescribe any arbitrary conditions to the grant. The fee of \$5 to be paid by an applicant for his examination is not a provision for raising revenue, but is no more than an equivalent for the service rendered, and cannot be considered in the light of a tax or burden upon transportation. The applicant is required, before obtaining his license, to satisfy a board of examiners in reference to his knowledge of practical mechanics, his skill in operating a locomotive engine, and his general competency as an engineer; and the board before issuing the license is required to inquire into his character and habits, and to withhold the license if he be found to be reckless or intemperate.

Certainly it is the duty of every carrier, whether engaged in the domestic commerce of the state or in interstate commerce, to provide and furnish itself with locomotive engineers of this precise description, competent and well qualified, skilled and sober; and if, by reason of carelessness in the selection of an engineer not so qualified, injury or loss is caused, the carrier, no matter in what business engaged, is responsible according to the local law admitted to govern in such cases, in the absence of congressional legislation."

"Dealing in corporate or quasi corporate securities without first securing a license from a specified state official, obtainable only upon an application setting out certain information respecting the applicant's business, with references establishing good

repute, may be forbidden by a state, in the exercise of its police power, as is done by Ohio Gen. Code, Secs. 6373-1 to 6373-24, notwithstanding the declarations of U. S. Const. 14th Amend., that no person shall be deprived of his life, liberty, or property without due process of law, or denied the equal protection of the laws."

Harry T. Hall v. Geiger-Jones Company, 242 U. S. 539, 61 Law. Ed. 480.

On page 489, 61 Law. Ed., in the case *supra*, it is said:

"It will be observed, therefore, that the law is a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties, or other repressive measures. The name that is given to the law indicates the evil at which it is aimed; that is, to use the language of a cited case, 'speculative schemes which have no more basis than so many feet of 'blue sky'; or, as stated by counsel in another case, 'to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations.' Even if the descriptions be regarded as rhetorical, the existence of evil is indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government, and that the appreciation of the consequences of it is not open for our review. *Trading Stamp Cases*, *Rast v. Van Deman & L. Co.*, 240 U. S. 342, 60 L. Ed. 679, L. R. A. 1917A, 421, 36 Sup. Ct. Rep. 370; *Tanner v. Little*, 240 U. S. 369, 60 L. Ed. 691, 36 Sup. Ct. Rep. 379; *Pitney v. Washington*, 240 U. S. 387, 391, 60 L. Ed. 703, 706, 36 Sup. Ct. Rep. 385. Therefore, the purpose being legal, the question only remains whether the manner in which it is accomplished is illegal."

The Blue Sky Law is intended to put a stop to the

sale of securities that will not pass inspection by the State Securities Commission and is a proper exercise of the police power to protect the public against impositions.

State v. Gopher Tire & Rubber Co., 177 N. W. 937 (Minn.).

In the case *supra* on page 938, the court stated:

“The purpose of the statute is to protect the public against imposition. It is a new form of regulatory law which, in the course of a few years, has swept over 33 states. It has been said that its popular name indicates the evil at which it is aimed, that is, speculative schemes having no more basis than so many feet of blue sky (*Hall v. Geiger-Jones Co.*, 242 U. S. 549, 37 Sup. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643; *State v. Agey*, 171 N. C. 831, 88 S. E. 726), and that it is intended to put a stop to the sale of shares in visionary oil wells, non-existent gold mines, and other ‘get-rich-quick’ schemes calculated to despoil credulous individuals of their savings. It is a proper and needful exercise of the police power of the state and should not be given a narrow construction; for it was the evident purpose of the legislature to bring within the statute the sale of all securities not specifically exempted. The commission is better qualified than the average investor to ascertain whether any real values lie behind mere paper evidences of value. It has power, in making its investigation, to compel a full disclosure of the facts upon which to base an intelligent judgment.”

The state has the right to regulate the business of buying and selling bonds and to forbid the dealing therein without the permit of some state official.

Hall v. Geiger-Jones Co., 242 U. S. 539, 61 L. Ed. 480, L. R. A. 1917F, 514, 37 Sup. Ct. Rep. 217, Ann. Cas. 1917C, 643.

Caldwell v. Sioux Falls Stock Yards Co., 242 U. S. 559, 61 L. Ed. 493, 37 Sup. Ct. Rep. 224.

Merrick v. N. W. Halsey & Co., 242 U. S. 568,
61 L. Ed. 498, 37 Sup. Ct. Rep. 227.

Riley v. Chambers,
8 A. L. R. 419.

"The police power of the state justifies, notwithstanding the limitations of U. S. Const. 14th Amend., the enactment of Mich. Pub. Acts 1915, Act No. 46, which forbids, (with certain exceptions and exemptions) the sale of corporate or quasi corporate securities that have not first received the approval of the State Securities Commission, obtainable only after certain prescribed data have been filed with the Commission, and requires dealers in such securities to obtain a license from the Commission, and forbids them to deal in any other than approved securities, or to transact business on any other plan than that set forth in the statements and papers which they have filed with such Commission."

*Frank W. Merrick, John W. Haarer and Grant
Fellows v. N. W. Halsey & Company et al.*,
242 U. S. 568, 61 L. Ed. 498.

The court in the case *supra* on page 508, 61 L. Ed., stated:

"The first incidence of any evil from a business or conduct is upon some individual, and through the individual (let us say individuals, for necessarily there are more than one) upon the community; nor can it be affected in any other way. Besides, it is for the state to judge in such circumstances, and the judgment and its execution would have to be palpably arbitrary to justify the interference of the courts."

Also, on page 509, 61 L. Ed., the court said:

"Upon this difference in views we are not called upon to express an opinion, for, as we have said, the judgment is for the state to make, and in the belief of evils and the necessity for their remedy and the manner of their remedy the state has determined that the business of dealing in securities shall have ad-

ministrative supervision, and 26 states have expressed like judgments.

Much may be said against these judgments, as much has been said, and decisions of the courts have been cited against them. We are not insensible to the strength of both, but we cannot stay the hands of government upon a consideration of the impolicy of its legislation. Every new regulation of business or conduct meets challenge, and, of course, must sustain itself against challenge and the limitations that the Constitution imposes. But it is to be borne in mind that the policy of a state and its expression in laws must vary with circumstances. And this capacity for growth and adaptation we said, through Mr. Justice Matthews, in *Hurtado v. California*, 110 U. S. 516, 530, 28 L. Ed. 232, 237, 4 Sup. Ct. Rep. 111, 292, is the 'peculiar boast and excellence of the common law.' It may be that constitutional law must have a more fixed quality than customary law, or, as was said by Mr. Justice Brewer, in *Muller v. Oregon*, 208 U. S. 412, 420, 52 L. Ed. 551, 555, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action.' This, however, does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments to the organic law. We may feel the difficulties of the new applications which are invoked, the strength of the contentions and the arguments which support or oppose them, but our surest recourse is in what has been done, and in the pending case we have analogies if not exact examples to guide us. So guided and so informed, we think the statute under review is within the power of the state.

* * *

It is, however, said that, assuming the statute have such purpose, the fraud referred to is not a proper object for the police power, and it is asked, 'Can the occasional fraud, that fraud which arises in the individual transaction, justify a law regulating the business of which the single transaction is a part? Or must it be fraud which is incidental to the business—a fraud which the business itself, from its char-

acter and the manner in which it is generally conducted, invites and encourages?' And, quoting from *People ex rel. Tyroler v. Warden*, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006: 'It is a novel legislation, indeed, that attempts to take away from all the people the right to conduct a business because there are wrongdoers in it.' To the latter we say the right to do business is not taken away; the other we have already answered and need only add that we cannot, upon such considerations, limit the power of the state. The state must adapt its legislation to evils as they appear, and is not helpless because of their forms."

"The state in the exercise of its police power, could, consistently with the Federal Constitution, enact so much of Mich. Pub. Acts 1913, Act No. 301, as provides for the licensing of private employment agencies, and prescribes reasonable regulations in respect to them, to be enforced according to the legal discretion of a commissioner, including a provision making it a misdemeanor to send one seeking employment to an employer who has not applied for help."

Le Roy Brazee v. People of the State of Michigan, 241 U. S. 340, 60 Law. Ed. 1034.

The court in the case *supra*, 60 Law. Ed. page 1036, stated that:

"The general nature of the business is such that, unless regulated, many persons may be exposed to misfortunes against which the legislature can properly protect them."

"Conducting a private employment agency for hire is an occupation for which the legislature may require a license fee in order to promote the public welfare."

George W. Price v. The People of the State of Illinois, 192 Ill. 114.

The court in the case *supra* on pages 117 and 118, stated:

"It is an attribute of sovereign power to enact

laws for the exercise of such restraint and control over the citizen and his occupation as may be necessary to promote the health, safety and welfare of society. This power is known as the police power. In its exercise the General Assembly may provide that any occupation which is the proper subject of the power may not be pursued by the citizen except authorized by a license issued by public authority so to do. Such enactment may require the payment of a fee and the execution of a bond with security, conditioned in view of the objects and purpose of the act, as a prerequisite to the issuance of such license. * * * That the public welfare demands legislation prescribing regulations and restrictions to protect against the evils of imposition and extortion which have manifested themselves in the conduct of private employment agencies is not controverted by counsel for plaintiff in error."

"The right of the individual under U. S. Const. 14th Amend., to engage in a useful and lawful business is unwarrantably infringed by the provisions of the Washington Employment Agency Law (Wash. Laws 1915, Chap. 1), enacted in the purported exercise of the police power, which make it criminal to demand or receive, either directly or indirectly, from any person seeking employment, or from any person on his or her behalf, any remuneration or fee for furnishing such person with employment or with information leading thereto."

Joe Adams v. W. V. Tanner and George H. Crandall, 244 U. S. 590, 61 L. Ed. 1336.

The court in the case *supra* on page 1342, 61 L. Ed., said:

"We have held employment agencies are subject to police regulation and control. 'The general nature of the business is such that, unless regulated, many persons may be exposed to misfortunes against which the legislature can properly protect them.' *Brazee v. Michigan*, 241 U. S. 340, 343, 60 L. Ed. 1034, 1036, 36 Sup. Ct. Rep. 561. But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative

of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand. In *Spokane v. Macho*, 51 Wash. 322, 324, 21 L. R. A. (N. S.) 263, 130 Am. St. Rep. 1100, 98 Pac. 755, the Supreme Court of Washington said: 'It cannot be denied that the business of the employment agent is a legitimate business; as much so as is that of the banker, broker, or merchant; and under the methods prevailing in the modern business world it may be said to be a necessary adjunct in the prosecution of business enterprises.' Concerning the same subject, *Ex Parte Dickey*, 144 Cal. 234, 236, 66 L. R. A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428, the Supreme Court of California said: 'The business in which this defendant is engaged is not only innocent and innocuous, but is highly beneficial, as tending the more quickly to secure labor for the unemployed. There is nothing in the nature of the business, therefore, that in any way threatens or endangers the public health, safety, or morals.' And this conclusion is fortified by the action of many states in establishing free employment agencies charged with the duty to find occupation for workers."

Also, on page 1343, 61 L. Ed., in the case *supra* the court said:

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices."

Real estate brokers' statutes held valid in other states are:

Johnson v. Hulings, 103 Pa. 498, 49 Am. Rep. 131; *Com. v. Real Estate Trust Co.*, 211 Pa. 51, 60 Atl. 551; *Com. v. Samuel Balck Co.*, 223 Pa. 74, 72 Atl. 261; 19 Cyc. 187; *Little Rock v. Barton*, 33 Ark. 436; *Denning v. Yount*, 62 Kan. 217, 50 L. R. A. 103, 61 Pac. 803; *Buckley*

v. *Humason*, 50 Minn. 195, 16 L. R. A. 423, 36 Am. St. Rep. 637, 52 N. E. 385; *Blackford v. State*, 8 Heisk 538; *St. Louis v. McCann*, 157 Mo. 301, 57 S. W. 1016; *Braunn v. Chicago*, 110 Ill. 186; *Banta v. Chicago*, 172 Ill. 204, 40 L. R. A. 611, 50 N. E. 233.

Riley v. Chambers,
8 A. L. R. 419.

A statute requiring real estate brokers to furnish evidence of good moral character or reputation and to secure a license is a valid exercise of the police power.

Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Ct. Rep. 233; *Ex Parte Whitley*, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; *Ex Parte McManus*, 151 Cal. 331, 90 Pac. 702; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011, L. R. A. 1915C, 1189, 34 Sup. Ct. Rep. 612.

Riley v. Chambers,
8 A. L. R. 419.

"An act of Missouri, March 28, 1903, requiring that brokers in cities of 300,000 inhabitants and more shall have written authority for the sale of real estate and providing that any broker selling such property without written authority shall be guilty of misdemeanor, is unconstitutional."

Klene v. Marjorie Realty Co., 128 S. W. 980.

"The provisions of the act requiring brokers to pay an annual license fee of \$10 and salesmen of \$2, and requiring the former to furnish certificates of character by two land owners, and the latter to furnish certificates by their employers, are not unreasonable discriminations."

Riley v. Chambers, 181 California 589.

The court in the case *supra* on page 593, stated that:

"Now the single primary purpose of the act is to

require of real estate brokers and salesmen that they be 'honest, truthful and of good reputation.' All of its provisions, including the requirement of a license, are but incidental to this single purpose and designed to accomplish it. In the nature of things no amount of regulation can insure the possession of those qualities by everyone engaged in the business, and it is easy to conceive of regulations which would have this as their sole object and yet be so extreme as practically to take away the general right of engaging in the business. Two questions, therefore, arise regarding such regulations as those here imposed: First, is the general limitation that only persons of good character may engage in the particular business a safeguard which may reasonably be required as to that business? And second, are the specific limitations prescribed to accomplish the general purpose no more than reasonable therefor?

As to the second question, there is no controversy in the present case, and in fact there could not well be any. It is clear that if it is permissible to require some assurance of good character, the specific limitation imposed for the purpose by this act that everyone seeking to engage in the business shall file a written application accompanied by a certificate of good character, is no more than reasonable. The controversy is over the first question, whether or not the general limitation that only persons of good character should engage in the business is a permissible one. The position of counsel opposing the validity of the act is that 'To prevent a person engaging in a lawful and "innocuous" business or occupation because of his moral character or reputation is in our opinion an arbitrary invasion of private rights and liberties.' This may be true of some businesses and vocations. It is certainly not true of all. Where the occupation is one of which it can be fairly said that those pursuing it should have certain particular qualifications, it is within the power of the legislature to exact reasonable assurances of those pursuing the occupation that they do possess these qualifications. The most familiar illustrations of this are the qualifications of preliminary training and learning required of professional men such as lawyers, phys-

icians, dentists, pharmacists and architects. Where the occupation is one wherein those following it act as the agents and representatives of others and in a more or less confidential and fiduciary capacity, it certainly can be fairly said that those pursuing it should have in a particular degree the qualifications of 'honesty, truthfulness and good reputation.' The occupation of a real estate agent is of just this sort. He acts for others and in a more or less confidential and fiduciary capacity. As a result there is particularly required of him for the proper discharge of his duties honesty and truthfulness, and the legislature has the right to require some assurance of their possession by everyone following the occupation. One strong assurance of their possession is a good reputation.

No extended discussion of this point is necessary. It is definitely settled by the Supreme Court of the United States in *Hall v. Geiger-Jones Co.*, 242 U. S. 539, (Ann. Cas. 1917C, 643, 61 L. Ed. 480, 37 Sup. Ct. Rep. 217). The State of Ohio had passed a law requiring every dealer in securities, such as a bond-house, to obtain a license from the state superintendent of banks. As a condition of obtaining such a license the dealer was required to establish his good repute to the satisfaction of the state official. The same attack was made upon the law by reason of this provision as is now made upon the California law, but its validity was upheld. So far as this point is concerned, there is certainly no difference between the occupation of a dealer in securities and that of a real estate agent. In fact, the relation of the latter to his client is of a more fiduciary character than that of the security dealer to his customer."

Also, on page 593 in the case *supra* the court stated:

"It is equally true that a lawful and useful occupation may be subjected to regulation in the public interest, and that all regulation involves in some degree a limitation upon the exercise of the right regulated. The test is whether or not the limitation imposed is really by way of regulation only, is one whose purpose and effect go no further than throwing reasonable safeguards in the public interest

around the exercise of the right. If the limitation is of this character, its imposition is a proper exercise of the police power resident in the legislature, and whose exercise is one of the latter's most important functions."

"An ordinance giving the mayor power to determine whether a person applying for a license to sell cigarettes has good character and reputation and is a suitable person to be intrusted with their sale, but requiring him to grant a license to every person fulfilling these conditions, does not vest in him any arbitrary power to grant or refuse a license, in violation of the provisions of U. S. Const. 14th Amend., either in regard to the clause requiring due process of law, or in that requiring equal protection of the laws."

Harry Gundling v. City of Chicago, 177 U. S. 183, 44 Law. Ed. 725.

In the case *supra* on page 728, 44 Law. Ed., it is said:

"In the case at bar, the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be intrusted with the sale of cigarettes, provided such applicant will file a bond as stated in the ordinance, as a security that he will faithfully observe and obey the laws of the state and the ordinances of the city with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature by him. There is no proof nor charge in the record that there has been any discrimination against individuals applying for a license or any abuse of discretion on the part of the mayor. Whether dealing in and selling cigarettes is that kind of a business which ought to be licensed is, we think, considering the character of the article to be sold, a question for the state, and, through it, for the city to determine for itself, and that an ordinance providing, reasonable conditions upon the performance of which a license may be granted to sell such article does not violate any provision of the Federal Constitution.

Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference.

“The vocation of cement contractor is not a proper subject of police regulation by a city, as it does not affect either the health, morals, safety, or welfare of the public generally, so as to be a necessary subject of regulation.”

State ex rel. Sampson v. City of Sheridan et al.,
170 Pacific 1 (Wyoming).

It is stated in the opinion in the case *supra* on page 3, that:

“‘It is not sufficient that the public sustains harm from a certain trade or employment as it is conducted by some engaged in it. Because many men engaged in the calling persist in so conducting the business that the public suffers and their acts cannot otherwise be effectually controlled is no justification for a law which prohibits an honest man from conducting the business in such a manner as not to inflict injury upon the public.’ *Tolliver v. Blizzard*, *supra*. ‘In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare, that there is some clear, real, and substantial connection between the assumed purpose of the enactment, and the actual provisions thereof.’”

"The Act of 1897, which attempts to regulate the occupation of horse-shoeing by requiring horse-shoers to practice the calling for four years, submit to an examination by the board of examiners and pay a license fee for the privilege of exercising the calling, is unconstitutional."

Edward Bessette v. The People of the State of Illinois, 193 Ill. 334.

The court in the case *supra* on page 243, stated that :

"The general rule is, that a license fee will not be exacted for the purpose of regulating any trade, calling or occupation, unless there is something in the nature of such trade, calling or occupation, or in the circumstances surrounding it, which calls for the exercise by the state of its police power. In other words, licenses for regulation merely, and not for revenue, can only be justified upon the ground that a necessity exists for the exercise by the state, either directly, or through delegation to municipal corporations of its police power. The police power is limited to enactments which have reference to the public health or comfort, or to the safety or welfare of society. It has been said that 'when the license is for regulation merely * * * the question presented is, whether the business or occupation is one rendering special regulation important for any purpose of protection to the public, or to guard individuals against frauds and impositions.' (Cooley on Taxation, 2d Ed., p. 600; *Hawthorn v. People*, 109 Ill. 302.) Laws, which interfere with the personal liberty of the citizen and his right to pursue such avocation or calling as he may choose, cannot be constitutionally enacted, unless the public health, comfort, safety or welfare demands their enactment. (*Ruhrstrat v. People*, 185 Ill. 133; *Bailey v. People*, 190 id. 28.)"

"It is impossible to conceive how the health, comfort, safety or welfare of society is to be promoted by requiring a horse-shoer to practice the business of horse-shoeing for four years, and submit to an examination by a board of examiners, and pay a license fee for the privilege of exercising his calling. The ends to be secured by the exercise of the police power

are the public health, comfort, safety or welfare, but this measure has no relation to the ends thus specified."

"The police power of a state extends to requiring street railway companies to sprinkle the surface of the streets occupied by their railways between the rails and tracks, and for a sufficient distance beyond the outer rails so as effectually to lay the dust and prevent the same from arising when the cars are in operation.

A street railway company may, consistently with due process of law, be required by municipal ordinance to sprinkle the surface of the streets occupied by its tracks between the rails and tracks, and for a sufficient distance beyond the outer rails, so as effectually to lay the dust and prevent the same from arising when the cars are in operation."

Pacific Gas & Electric Co. v. City of Sacramento, Cal., et al., 251 U. S. 22, 64 L. Ed. 112.

The court in the case *supra*, on page 117, stated that:

"That the regulation made by the ordinance was inherently within the police power is, we think, too clear for anything but statement. We cite in the margin, however, decided cases dealing with the subject, in some of which the power here in question, when exerted for the same purpose and to the same extent, was upheld, and in others of which, although the manifestations of the exercise of the power were somewhat different, its existence was accepted as indisputable; and to text-writers who state the same view.

That the power possessed was, on the face of the ordinance, not unreasonably exerted, and therefore that its exercise was not controlled by the due process clause of the 14th amendment, is, we are also of opinion, equally clear. And this is true likewise of the contention as to the equal protection clause of the amendment, since that proposition rests upon the obviously unwarranted assumption that no basis for classification resulted from the difference between the operation of the street railway cars moving on tracks in the streets of the city and the

movement of a different character of vehicles in such streets. Affirmed."

"A person is not deprived of liberty without due process of law by being adjudged a lunatic in his absence, under Ala. Civ. Code 1886, section 2393, providing that the sheriff may take possession of the person, 'and, if consistent with his health or safety, have him present at the place of trial,' where such person is duly served with process, but is not produced by the sheriff at the trial because, on examination by a physician, it is deemed to be inconsistent with his health or safety, and he is not in fact prevented from attending the hearing or refused opportunity to be represented there by counsel.

The proceedings in a state court; in order to constitute due process of law under U. S. Const., 14th Amend., need not be by any particular mode, if they constitute a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it."

Jetta Simon v. John N. Craft, 182 U. S. 427, 45 L. Ed. 1165.

The court on page 1170, 45 L. Ed., in the case *supra*, said:

"The contention now urged is that notice imports an opportunity to defend, and that the return of the sheriff conclusively established that Mrs. Simon was taken into custody, and was hence prevented by the sheriff from attending the inquest or defending through counsel if she wished to do so in consequence of the notice which she received. It seems, however, manifest—as it is fairly to be inferred the state court interpreted the statute—that the purpose in the command (436) of the writ, 'to take the person alleged to be of unsound mind, and, if consistent with her health or safety, have her present at the place of trial,' was to enforce the attendance of the alleged *non compos*, rather than to authorize a restraint upon the attendance of such person at the hearing. In other words, that the detention authorized was simply such as would be nec-

essary to enable the sheriff to perform the absolute duty imposed upon him by law of bringing the person before the court, if in the judgment of that officer such person was in a fit condition to attend, and hence it cannot be presumed, in the absence of all proof or allegation to that effect, that the sheriff in the discharge of this duty, after serving the writ upon the alleged lunatic, exerted his power of detention for the purpose of preventing her attendance at the hearing, or of restraining her from availing herself of any and every opportunity to defend which she might desire to resort to, or which she was capable of exerting. The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things, and not by mere form. *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 44 L. Ed. 747, 20 Sup. Ct. Rep. 230. We cannot, then, even on the assumption that Mrs. Simon was of sound mind and fit to attend the hearing, hold that she was denied due process of law by being refused an opportunity to defend, when, in fact, actual notice was served upon her of the proceedings, and when, as we construe the statute, if she had chosen to do so, she was at liberty to make such defense as she deemed advisable.

* * * *

But the due process clause of the 14th amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it. *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 236, 44 L. Ed. 747, 750, 20 Sup. Ct. Rep. 230, and cases cited. If the essential requisites of full notice and an opportunity to defend were present, this court will accept the interpretation given by the state court as to the regularity, under the state statute, of the practice pursued in the particular case."

"Leaving on one side the question whether an alien can rightfully invoke the due process clause of the constitution who has entered the country clandestinely, and who has been here for too brief

a period to have become, in any real sense, a part of our population, before his right to remain is disputed, we have to say that the rigid construction of the acts of congress suggested by the appellant are not justified. Those acts do not necessarily exclude opportunity to the immigrant to be heard, when such opportunity is of right. It was held in *Den ex dem. Murray v. Hoboken Land & Improv. Co.*, 18 How. 272, 280, 281, 283, 15 L. Ed. 372, 376, 377, that 'though "due process of law" generally implies and includes actor, rents, judex, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings, * * * yet this is not universally true;' and 'that though, generally, both public and private wrongs are redressed through judicial action, there are more summary extrajudicial remedies for both.' Hence, it was decided in that case to be consistent with due process of law for congress to provide summary means to compel revenue officers—and, in case of default, their sureties—to pay such balances of the public money as might be in their hands. Now, it has been settled that the power to exclude or expel aliens belonged to the political department of the government, and that the order of an executive officer invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was 'due process of law, and no other tribunal, unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.' *Nishimura Ekiu v. United States*, 142 U. S. 651, 659, 35 L. Ed. 1146, 1149, 12 Sup. Ct. Rep. 336; *Fong Yue Ting v. United States*, 149 U. S. 698, 713, 37 L. Ed. 905, 913, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing v. United States*, 158 U. S. 538, 547, 39 L. Ed. 1082, 1085, 15 Sup. Ct. Rep. 967. But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the constitution. * * *

One of these principles is that no person shall be deprived of his liberty without opportunity, at some

time, to be heard, before such officers, in respect of the matters upon which that liberty depends,—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the secretary of the treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.”

Kaoru Yamataya, Appt., v. Thomas M. Fisher, Immigrant and Chinese Inspector, 189 U. S. 86, 47 L. Ed. 725.

“A state may forbid the sale of farm produce on commission without an annual license to be procured from the state board of agriculture upon a proper showing and a bond conditioned to make honest accounting, and may impose a license fee of \$10, as is done by Kan. Laws 1915, chap. 371, without abridging constitutional rights and privileges of grain dealers carrying on business in the state or depriving them of the equal protection of the laws, or taking their property without due process of law.”

W. S. Payne, L. H. Powell, et al., v. State of Kansas ex rel. S. M. Brewster, Attorney General, 248 U. S. 112, 63 L. Ed. 153.

On page 155, 63 L. Ed., in the case, *supra*, it is said:

“Plaintiffs in error maintain that the statute is class legislation which abridges their rights and privileges; that it deprives them of the equal pro-

tection of the laws and also of their property with due process of law,—all in violation of the 14th amendment.

Manifestly, the purpose of the state was to prevent certain evils incident to the business of commission merchants in farm products by regulating it. Many former opinions have pointed out the limitations upon powers of the states concerning matters of this kind, and we think the present record fails to show that these limitations have been transcended."

"The constitutional provision that no state shall deprive any person of life, liberty or property, without due process of law, does not require that persons taxed by the law of the state shall be present or have an opportunity to be present when the tax is assessed against them."

William K. McMillen v. Robert K. Anderson,
95 U. S. 37, 24 L. Ed. 335.

The court in the case *supra*, on page 336, 24 L. Ed., said:

"Looking at the Louisiana statute here assailed, the Act of March 14, 1873, we feel bound to say, that, if it is void on the ground assumed, the revenue laws of nearly all the states will be found void for the same reason. The mode of assessing tax in the states by the Federal Government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary or unequal, or illegal. It must, under our constitution, be lawfully done.

By that does not mean, nor does the phrase 'due process of law' mean by a judicial proceeding. The nation from whom we inherit the phrase 'due process of law' has never relied upon the counts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision because, in any view that can be taken of it, the statute under consideration does not violate it. It enacts that, when any person shall fail or refuse to pay his license tax, the collector shall give 10 days' written

or printed notice to the delinquent requiring its payment; and the manner of giving this notice is fully prescribed. If at the expiration of this time the license 'be not fully paid, the tax collector may, without judicial formality, proceed to seize and sell, after 10 days' advertisement, the property' of the delinquent, or so much as may be necessary to pay the tax and costs.

* * * *

But however that may be, it is quite certain that he can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction. See *Fouqua*, Code of Pr. La., arts. 296-309, inclusive. The Act of 1874 recognizes this right to an injunction, and regulates the proceedings when issued to stay the collection of taxes."

"Chapter 230 of the Laws of New York of 1843 is constitutional. It does not deprive of liberty or property without due process of law, nor of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. The phrase 'due process of law' does not necessarily mean a judicial proceeding."

Francis A. Palmer v. Martin T. McMahon, Receiver of Taxes of City of New York, 133 U. S. 600, 33 L. Ed. 772.

In the case *supra*, on page 776, 33 L. Ed., the court stated:

"The phrase 'due process of law' does not necessarily mean a judicial proceeding. 'The nation from whom we inherit the phrase "due process of law"', said this court, speaking by Mr. Justice Miller, 'has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation.' *McMiller v. Anderson*, 95 U. S. 37, 1 (24: 335, 336).

"The power to tax belongs exclusively to the legislative branch of the government, and when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case, the as-

assessment cannot be said to deprive the owner of his property without due process of law. *Spencer v. Merchant*, 125 U. S. 345 (31: 763); *Walston v. Nevin*, 128 U. S. 578 (32: 544). The imposition of taxes is in its nature administrative and not judicial, but assessors exercise quasi judicial powers in arriving at the value, and opportunity to be heard should be given under all just systems of taxation according to value.

It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made. *Hagar v. Reclamation District*, 111 U. S. 701, 710 (28: 569, 571).

The Law of New York gave opportunity for objection before the tax commissioners (Laws of New York, 1859, chap, 302, section 10, p. 681), and the plaintiff in error appeared and obtained a large deduction from the original valuation. If dissatisfied with the final action of the commissioners, he could have had that action reviewed on certiorari."

"Extra-official or casual notice, or a hearing granted as a matter of favor or discretion in proceedings for the taking of one's property to satisfy his alleged debt or obligation, is not a substantial substitute for the due process of law which U. S. Const., 14th Amend., requires."

Henry L. Coe v. Armour Fertilizer Works, 237 U. S. 417, 59 L. Ed. 1028.

On page 1032, 59 L. Ed., the court stated:

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the constitution requires. In *Stuart v. Palmer*, 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to

a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in *Security Trust & S. B. Co. v. Lexington*, 203 U. S. 323, 333, 51 L. Ed. 204, 208, 27 Sup. Ct. Rep. 87, the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute' (citing the New York case). So, in *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 138, 52 L. Ed. 134, 141, 28 Sup. Ct. Rep. 47, the court said: 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' In *Roller v. Holly*, 176 U. S. 398, 409, 44 L. Ed. 520, 524, 20 Sup. Ct. Rep. 410, the court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.'

* * *

"This case bears no proper analogy to *York v. Texas*, 137 U. S. 15, 21, 34 L. Ed. 604, 605, 11 Sup. Ct. Rep. 9; *Kauffman v. Wootters*, 138 U. S. 285, 34 L. Ed. 962, 11 Sup. Ct. Rep. 298, and *Western Life Indemnity Co. v. Rupp*, 235 U. S. 261, 272, ante, 220, 224, 35 Sup. Ct. Rep. 37, where it was held that a state, without violence to the due process clause of the 14th Amendment, may so regulate its practice that a person who voluntarily enters one of its courts to contest any question in a pending action—even a person appearing specially to object that the court has not acquired jurisdiction over him—may be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and hence be bound by its determination of the merits if his objection to the jurisdiction be overruled.

For in this case there was no pending action or issue; plaintiff in error came into court to object, on jurisdictional grounds, to the execution of final process upon his property. And the effect of the decision under review was to convert his petition, which simply raised an issue of law under the state constitution and the 14th Amendment, into a tender of an issue of fact respecting his status as a stockholder and the amount of his unpaid subscription, if any, and then to hold him concluded upon the latter issue for failure to introduce evidence bearing upon it. In doing this, the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice. *Reynolds v. Stockton*, 140 U. S. 254, 268, 269, 35 L. Ed. 464, 468, 469, 11 Sup. Ct. Rep. 773.”

“The Michigan sales-in-bulk act (Pub. Acts 1905, No. 223), avoiding, as against creditors, sales in bulk otherwise than in the regular course of business, unless an inventory is made at least five days before the sale, and the purchaser receives a list of the seller’s creditors, and notifies them of the proposed sale personally, or by registered mail, at least five days before its consummation, and making a purchaser not conforming to the statute a receiver for the benefit of the seller’s creditors, is a valid exercise of the police power, and does not deny due process or the equal protection of the laws.”

Kidd, Dater & Price Company v. Musselman Grocer Company, 217 U. S. 461, 54 Law. Ed. 839.

In the case *supra*, on page 845, 54 Law. Ed., it is said:

“The purpose of both statutes is the same, viz., to prevent the defrauding of creditors by the secret sale of substantially all of a merchant’s stock of goods in bulk, and both require notice of such sale, and make void as to creditors a sale without notice.”

“The California law under which the assessment in this case was made and levied, does not conflict

with the clause of the 14th Amendment of the Constitution, declaring that no state shall deprive any person of life, liberty or property without due process of law."

George Hagar v. Reclamation District No. 108,
111 U. S. 701, 28 L. Ed. 569.

The court on page 572, 28 L. Ed., in the case *supra*, stated:

"That clause of the 14th Amendment is found, in almost identical language, in the several state constitutions and is intended as additional security against the arbitrary deprivation of life, and liberty and the arbitrary spoliation of property. Neither can be taken without due process of law. What constitutes that process it may be difficult to define with precision so as to cover all cases. It is, no doubt, wiser, as stated by Mr. Justice Miller in *Davidson v. New Orleans*, to arrive at its meaning 'By the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' 96 U. S. 104 (XXIV, 619). It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained, and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. *Hurtado v. California* (*ante*, 232).

The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him or without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing. His

contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty or property. Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson v. New Orleans*: 'In judging what is "due process of law" respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvements or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law." ' The power of taxation possessed by the state may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the constitution of the United States. As said by this court, 'It may touch property in every shape, in its natural condition, in its manufactured form and in its various transmutations. And the amount of the taxation may be determined by the value of the property or its use or its capacity or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the state, as to the mode, form and extent of taxation, is unlimited, where the subjects to which it applies are within her jurisdiction.'

“Upon the point just stated we are referred to the decision of this court in *Chicago, M. & St. P. Railway Co. v. Minnesota*, 134 U. S. 418, 452, 456, 457 (33 :970, 977, 980, 981, 3 Inters. Com. Rep. 209). That case involved the constitutionality of a statute of Minnesota empowering a commission to fix the rates of charges by railroad companies for the transportation of property. The Supreme Court of the state held that it was intended by the statute to make the action of the commission final and conclusive as to rates, and that the railroad companies were not at liberty, in any form or at any time, to question them as being illegal or unreasonable. This court said: ‘This being the construction of the statute by which we are bound in considering the present case we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.’ By the second section of the statute in question it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the com-

pany is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States."

San Diego Land & Town Company v. City of National City, and John G. Routsan, George W. Deford, S. S. Johnston, J. H. Kincaid, and Fred H. Sanborn, trustees of said city, 174 U. S. 739, 43 L. Ed. 1158.

"A distress warrant issued by the Solicitor of the Treasury under the Act of May 15, 1920, against a delinquent collector, is not in conflict with the Constitution, but is 'due process of law.'"

John Den, ex. dem., James B. Murray, and John C. Kayser v. The Hoboken Land and Improvement Company, 15 L. Ed. 372, 59 U. S. 385.

In the case *supra*, on page 376, 15 L. Ed., the court said:

"Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the Act of 1820 cannot be denied to the due process of law, when applied to the ascertainment and recovery of balances due to the Government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though 'due process of law' generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, 2 Inst. 47, 50; *Hoke v. Henderson*, 4 Dev. N. C. 15; *Taylor v. Porter*, 4 Hill. 146; *Van Zandt v. Waddel*, 2 Yerger 260, 599; *State Bank v. Cooper*, *Ibid.* 599; *Jones' Heirs v. Perry*, 1 Yerg. 59; *Greene v. Briggs*, 1 Curtis, yet this is not universally true. There may be, and

we have seen that there are cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with those proceedings.

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the Act of the President in calling out the militia under the Act of 1795, 12 Wheat. 19, or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient, to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United States v. Ferreira*, 13 How. 40. It is necessary to go further and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the 2d section of the 3d article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The Act of 1820 makes such a provision for reviewing the decision of the accounting officers of the Treasury. But, until reviewed, it is final and binding; and the question is, whether its subject matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not."

"Due process of law requires no special provision for granting a hearing to applicants for registration by the board of registration in medicine created by Mich. Pub. Acts 1899, Act No. 237, where such act provides for semi-annual meetings of the board at specified times at the state capitol."

Augustus G. Reetz v. People of the State of Michigan, 188 U. S. 504, 47 L. Ed. 563.

On page 565, 47 L. Ed., in the case *supra*, the court stated:

"It is objected in the present case that the board of registration is given authority to exercise judicial powers without any appeal from its decision, inasmuch as it may refuse a certificate of registration if it shall find that no sufficient proof is presented that the applicant had been 'legally registered under Act No. 167 of 1883.' That, it is contended, is the determination of a legal question which no tribunal other than a regularly organized court can be empowered to decide. The decision of the State Supreme Court is conclusive that the act does not conflict with the State Constitution, and we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process. *Den ex dem. Murray v. Hoboken Land & Improv. Co.*, 18 How. 272, 15 L. Ed. 372; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Ex parte Wall*, 107 U. S. 265, 289, 27 L. Ed. 552, 562, 2 Sup. Ct. Rep. 569; *Dreyer v. Illinois*, 187 U. S. 71, 83, *ante*, 79, 85, 23 Sup. Ct. Rep. 28, 32; *People v. Nasbrouck*, 11 Utah 291, 39 Pac. 918. In the last case this very question was presented, and in the opinion, on page 305, Pac., p. 921, it was said:

"The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise "judicial power," as that phrase is commonly used, and as it is used in the organic act in conferring judicial power upon specified courts. The powers conferred on the board of medical examiners are no-wise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools, or by tax assessors or boards of

equalization in determining, for purposes of taxation, the value of property. The ascertainment and determination of qualifications to practice medicine by a board of competent experts, appointed for that purpose, is not the exercise of a power which appropriately belongs to the judicial department of the government.'

In *Hurtado v. California*, 110 U. S. 516, 25 L. Ed. 232, Mr. Justice Matthews, speaking for the court, discussed at some length and with citation of many authorities the essential elements of due process of law, and summed up the conclusions in these words (p. 537, L. Ed., p. 239):

'It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.'

Neither is the right of appeal essential to due process of law. In nearly every state are statutes giving, in criminal cases of a minor nature, a single trial, without any right of review. For nearly a century trials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court. In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted.

But while the statute makes in terms no provision for a review of the proceedings of (509) the board, yet it is not true that such proceedings are beyond investigation in the courts. In *Metcalfe v. State Bd. of Registration*, 123 Mich. 661, 82 N. W. 512, an application for mandamus to compel this board to register the petitioner was entertained, and, although the application was denied, yet the denial was based, not upon a want of jurisdiction in the court, but upon the merits.

It is further insisted that it is essential to a judi-

cial or quasi-judicial proceeding that it should give a person accused or interested the benefit of a hearing, and that there is in this statute no special provision for notice, or hearing, or authority to summon witnesses or to compel them to testify. The statute provides for semi-annual meetings at specified times at the state capitol, but the plaintiff in error did not appear at any of these meetings or there present an application for registration or showing of his right thereto; he simply sent to the secretary of the board a certified copy of his registration under the prior statute, and his diploma from the Independent Medical College of Chicago, Illinois. The latter was returned with a notice from the board that it had denied the application for registration. When a statute fixes the time and place of meeting any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice. If plaintiff in error had applied at any meeting for a hearing the board would have been compelled to grant it, and if on such hearing his offer of or demand for testimony had been refused, the question might have been fairly presented to the state courts to what extent the action of the board had deprived him of his rights."

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the Legislature of Minnesota, by the statute, that the rates recommended and published by the Commission, if it proceeds in the manner pointed out by the Act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the Commission are the only ones that are lawful, and therefore in contemplation of law, the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute,

there is no fact to traverse except the violation of law in not complying with the recommendations of the Commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the Commission, if it chooses to establish rates that are unequal and unreasonable.

This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judically of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a Railroad Commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing machinery of a court of justice."

The Chicago, Milwaukee and St. Paul R. Co. v. State of Minnesota, 134 U. S. 418, 33 L. Ed. 980.

"Due process of law in condemnation proceedings does not require that the assessment of damages shall be made by a jury.

There is no denial of due process of law in making the findings of fact by the triers of fact, whether commissioners or a jury, in a condemnation case, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted in their appraisal, or other errors in their proceedings."

Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685, 694, 41 L. Ed. 1165.

The court in the case *supra*, on page 1168, 41 L. Ed., stated:

"Neither can it be said that there was not 'due

process of law' in these condemnation proceedings, It is not essential that the assessment of damages be made by a jury. Such award may be made by commissioners, at least where there is * * * provision for review of (695) their proceedings in the courts. *Central Branch Union P. R. Co. v. Atchison, T. & S. F. R. Co.*, 25 Kan. 453, 463; *Cooley*, Const. Lim. 563. And sections 9 and 10 of the Act of 1892, under which these proceedings were had, requires that the commissioners make and file a report of their proceedings and determination in the Supreme Court of the County of Kings, and that application must be made to that court for a confirmation of the report; that notice of such application must be given, and that 'upon such application the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners or upon the ground that the award, in part or in whole, is excessive, or is insufficient,' and appeal was allowed from the decision of that court to a higher. We do not question the proposition that form is not the only thing essential to due process. We said in the recent case, *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (*ante*, 979), 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.'

It may be true, as contended, that, as construed by the court of appeals, the determination of the commissioners is conclusive as to the mere value of the property, but there is no denial of due process in making the findings of fact by the triers of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted by the triers in their appraisal, or other errors in their proceedings."

"Compelling railway companies to construct transverse openings in rights of way and roadbeds to take care of surface water, as is done by the amendment of Mo. Laws 1907, p. 169, to Rev. Stat. 1899, Section 1110, does, not impair the obligations of the railway companies' charters nor take their

property without compensation, contrary to the due process of law clause of U. S. Const., 14th Amend., since the statute in question was passed under the police power of the state for the general benefit of the community at large, and for the purpose of preventing unnecessary and widespread injury to property."

Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. Ed. 1204.

In the case *supra*, on page 1211, 59 L. Ed., the court stated:

"It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contracts and property rights are held subject to its fair exercise. *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558, 58 L. Ed. 721, 726, 34 Sup. Ct. Rep. 364, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 292, 43 L. Ed. 702, 704, 19 Sup. Ct. Rep. 465; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 592, 50 L. Ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *Bacon v. Walker*, 204 U. S. 311, 317, 51 L. Ed. 499, 502, 27 Sup. Ct. Rep. 289. We deem it very clear that the act under consideration is a legitimate exercise of the police power and not in any proper sense a taking of the property of plaintiff in error."

"A municipal ordinance that forbids the storing of petroleum or gasoline within 300 feet of any dwelling, beyond certain small quantities specified, is not, on its face, so unnecessary and unreasonable

as to render it invalid as taking property without due process of law."

Pierce Oil Corp. v. City of Hope, 248 U. S. 498, 63 L. Ed. 381.

The court in the case *supra*, on page 382, 63 L. Ed., stated that:

"A state may prohibit the sale of dangerous oils, even when manufactured under a patent from the United States. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115. And it may make the place where they are kept or sold a criminal nuisance; notwithstanding the 14th Amendment. *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273. The power 'is a continuing one, and a business lawful to-day may in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare, and be required to yield to the public good.'"

"Neither the contract nor due process of law clause of the Federal Constitution prevents a municipal corporation from promoting the public health, safety, or general welfare by forbidding a railway company, through whose acquiescence a part of its right of way through the city not occupied by its tracks has by long user become the city's principal business street, to shift cars on the four blocks of such tracks which lie in the heart of the city except during certain specified hours, or to permit cars to stand within those blocks for a longer period than five minutes, and by requiring the tracks to conform to the street grade, and the spaces between the rails to be filled in except at street intersections."

Atlantic Coast Line R. Co. v. City of Goldsboro, North Carolina, 232 U. S. 548, 58 L. Ed. 721.

The court in the case *supra*, on page 725, 58 L. Ed., stated:

"It is, among other things, contended by plaintiff in error that the ordinances are not within the powers conferred by the legislature of North Carolina upon the municipal corporation. This is a question

of state law, which, for present purposes, is conclusively settled by the decision of the Supreme Court of North Carolina in this case. *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 462, 42 L. Ed. 236, 237, 17 Sup. Ct. Rep. 829, and cases cited; *Lombard v. West Chicago Park Comrs.*, 181 U. S. 33, 43, 45 L. Ed. 731, 737, 21 Sup. Ct. Rep. 507."

Also on page 726, 58 L. Ed., in the case *supra*, the court said:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

That court further states in the case *supra*, on page 727, 58 L. Ed., that:

"Of course, if it appear that the regulation under criticism is not in any way designed to promote the health, comfort, safety or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the question arises whether the law-making body exceeded the legitimate bounds of the police power."

Also, the court in the case *supra*, on page 728, 58 L. Ed., stated:

"The regulations in question are thus found to be fairly designed to promote the public health, safety and welfare; the measures adopted appear to be reasonably suited to the purposes they are intended to accomplish; and we are unable to say that there is any unnecessary interference with the operations of the railroad, or with the property rights of plaintiff in error. Therefore, no violation of the 'contract' or 'due process' clauses is shown." Judgment affirmed.

"An owner of sheep is not deprived of his property without due process of law by Idaho Rev. Stat., Sections 1210, 1211, under which damages may be recovered from him for permitting his sheep to graze on the public domain within two miles of a dwelling house.

The police power of a state is not confined to the suppression of what is offensive, disorderly or unsanitary, but embraces regulations designed to promote the public convenience or the general prosperity."

Orlando F. Bacon v. Paul H. Walker, 204 U. S. 311, 51 L. Ed. 499.

In the case *supra*, on page 501, 51 L. Ed., the court said:

"The laws and policy of a state may be framed and shaped to suit its conditions of climate and soil. Illustrations of this power are afforded by recent decisions of this court. In *Clark v. Nash*, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, a use of property was declared to be public which, independent of the conditions existing in the state, might otherwise have been considered as private. So, also in *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527, 50 L. Ed. 581, 26 Sup. Ct. Rep. 301. In the first case there was a recognition of the power of the state to deal with and accommodate its laws to the conditions of an arid country and the necessity of irrigation to its development. The second was the recognition of the power of the state to work out from the conditions existing in a mining region the largest welfare of its inhabitants. And again, in *Offield v. New York, N. H. & H. R. Co.*, 203 U. S. 372, *ante*, 231, 27 Sup. Ct. Rep. 72, the principle of those cases was affirmed and applied to conditions entirely dissimilar, and it was declared that it was competent for a state to provide for the compulsory transfer of shares of stock in a corporation, the ownership of which stood in the way of the increase of means of transportation, and the public benefit which would result from that. Of pertinent significance is the case of *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L.

Ed. 729, 20 Sup. Ct. Rep. 576. There a statute of the State of Indiana was attacked, which regulated the sinking, maintenance, use and operation of natural gas and oil wells. The object of the statute was to prevent the waste of gas. The defendants in the action asserted against the statute the ownership of the soil and the familiar principle that such ownership carried with it the right to the minerals beneath and the consequent privilege of mining to extract them. The principle was conceded, but it was declared inapplicable, as ignoring the peculiar character of the substances—oil and gas—with which the statute was concerned. It was pointed out that those substances, though situated beneath the surface, had no fixed *situs*, but had the power of self-transmission. No one owner, it was therefore said, could exercise his right to extract from the common reservoir, in which the supply was held, without, to an extent, diminishing the source of supply to which all the other owners of the surface had to exercise their rights. The waste of one owner, it was further said, caused by a reckless enjoyment of his right, operated upon the surface owners. The statute was sustained as a constitutional exercise of the power of the state, on account of the peculiar nature of the right and the objects upon which it was exerted, for the purpose of protecting all of the collective owners.

These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a state, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 592, 50 L. Ed. 596, 609, 26 Sup. Ct. Rep. 341. In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate, and not offensive. Nor need we make extended comment

on the 2-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose.

* * * * *

We think, therefore, that the statutes of Idaho are not open to the objection that they take the property of plaintiff in error without due process of law, and pass to the consideration of the charge that they make an unconstitutional discrimination against the sheep industry."

"Municipal ordinances requiring all garbage and other refuse matter to be delivered at a specified crematory or reduction plant, there to be cremated or destroyed at the expense of the person, company, or corporation conveying the same, are not wanting in the due process of law required by U. S. Const., 14th Amend., as taking private property for public use without compensation, even if some of the substances so destroyed may have had some elements of value."

California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. Ed. 204.

In the case *supra*, on page 212, 50 L. Ed., the court in its opinion stated:

"The court has said that 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will.' *Crowley v. Christensen*, 137 U. S. 86, 89, 34 L. Ed. 620, 621, 11 Sup. Ct. Rep. 13. In *Mugler v. Kansas*, 123 U. S. 623, 664, 31 L. Ed. 205, 211, 8 Sup. Ct. Rep. 273, it appeared that certain distillery property in Kansas was purchased at a time when it was lawful in that state to manufacture and sell spirituous liquors, but which property, by reason of the subsequent prohibition of such manufacture and sale, had become of no value, or had materially diminished in value. The owner insisted that, by the necessary operation of the prohibitory statute, his prop-

erty was, in whole or in part, taken for public use without compensation. But this court said: 'The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.' In Sedgwick's Treatise on Statutory and Constitutional Law, the author says that 'the clause prohibiting the taking of private property without compensation is not intended as a limitation * * * of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given.'

"The expense of constructing a railway bridge over a highway, made necessary by the action of the municipality in opening such highway through the railway company's embankment, may be cast upon the railway company without denying the due process of law guaranteed by the Federal Constitution, which requires that compensation be made when private property is taken for public use."

*Cincinnati, Indianapolis & Western Railway Co.
v. City of Connersville*, 218 U. S. 336, 54 L.
Ed. 1060.

On page 1064, 54 L. Ed., the court said, in the case, *supra*:

"The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority, within whose limits the company's business was conducted. This court has said that 'the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own constitution or by the constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.'"

"The guaranty of due process of law inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, without notice and opportunity for a hearing."

Ochoa v. Hernandez Y Morales, 230 U. S., . . . , 57 L. Ed. 1428.

On page 1437, 57 L. Ed., in the case *supra*, the court stated:

"Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (2 Coke, Inst. 45, 50) and has been recognized since the revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

"Where boards or commissioners act in a judicial or quasi judicial capacity, notice is necessary to render their orders due process."

12 C. J. 1229.

"Notice is to be implied from the very fact that it is a constitutional requirement."

12 C. J. 1229.

"A statute will not be held unconstitutional for failure expressly to provide for notice, if the requirement of notice may be fairly implied from a consideration of all its provisions."

12 C. J. 1229 No. 24.

"The section of the code under which the order was made did not expressly provide for notice and an opportunity to be heard; but the Supreme Court of Georgia held that it must be construed in connection with other parts of the railroad commission law which did contain such provisions. As said in *Louisville & N. R. Co. v. Garrett*, 231 U. S. 313, 58 L. Ed. 242, 34 Sup. Ct. Rep. 48: 'It may be assumed that the statute * * * forbade arbitrary action; it required a hearing, the consideration of the relevant statements, evidence, and arguments submitted, and a determination by the commission' as to whether the discrimination complained of was unjust."

Wadley Southern Railway Co. v. Georgia, 235 U. S. 657, 59 L. Ed. 410.

BRATTON ET AL. v. CHANDLER ET AL., INDIVIDUALLY AND AS COPARTNERS UNDER THE FIRM NAME OF CHANDLER & WALDEN, ET AL.
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

No. 239. Argued October 10, 1922.—Decided November 13, 1922.

1. A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. P. 114.
 2. The law of Tennessee providing for licensing real estate brokers and salesmen and creating a real estate commission, where it authorizes the commission to "require and procure" proof of the honesty, etc., of any applicant, before issuing him a license (Laws 1921, c. 93, § 8), does not contemplate that such proof may be procured by the commission secretly, without giving the applicant notice or opportunity to learn its nature and source and to meet it. P. 114.
- Reversed.

APPEAL from a decree of the District Court granting a temporary injunction restraining the appellant state officials from executing, as respects the appellees, a statute requiring real estate brokers to obtain licenses.

Mr. M. M. Neil and *Mr. Nathan William MacChesney*, with whom *Mr. Frank M. Thompson*, Attorney General of the State of Tennessee, *Mr. Thomas H. Jackson* and *Mr. James L. McRee* were on the briefs, for appellants.

Mr. Elias Gates, with whom *Mr. Julian C. Wilson* and *Mr. Walter P. Armstrong* were on the brief, for appellees.

MR. JUSTICE McKENNA delivered the opinion of the Court.

The appellees, as complainants in the District Court in their capacity as copartners, or as individuals, assailed the constitutionality under the Fourteenth Amendment of the Constitution of the United States, of a statute of Tennessee passed in 1921, entitled, "An Act to define, regulate and license real estate brokers and real estate salesmen; to create a State Real Estate Commission, and to provide a penalty for a violation of the provisions hereof." Pub. Acts, 1921, c. 98.

Appellants Bratton, Adams and Brownlow were appointed Commissioners under the act, and they and the appellant Bates, as Attorney General of Shelby County, or as District Attorney General (he is described as the latter in the answer) of the County, were, it is alleged, charged with the duty of enforcing the act.

The pleadings are very elaborate and need not be reproduced. The court restrained the execution of the statute until its further order, basing its action upon the provisions of the statute, which the court decided did not afford to applicants for licenses due process of law. To review the order and the grounds of it, this appeal is directed.

The act constitutes a Commission to be appointed by the Governor of the State, and in twenty-one sections defines the powers and duties of the Commission, the qualifications of applicants for licenses, and the procedure they must observe.

The District Court (three judges sitting) gave a very studious and comprehensive consideration to the provisions of the act, but rested its decision adverse to the constitutionality of the act upon § 8. The determining pertinency of the section the court expressed by saying that "the first step in the proposed regulation" of the real estate business "is the granting and issuing of licenses as provided in Section 8" of the act. That "section gives color and purpose to every other section in the Act and without which the other sections would be meaningless."

We may then accept the controlling and comprehensive effect of the section and concentrate attention and decision upon it, pretermittting all others, or comment upon them.

The condemning comment of the court was that § 8 authorized the Commission, not only to require an applicant to furnish evidence of his qualifications, but to *procure* independently of the applicant any proof it may deem desirable, and this without any provision for notice or opportunity to meet the evidence so procured, nor even to be advised of the nature or source of the evidence. Because of this delinquency, the court was of opinion that the act did not afford due process of law and was, therefore, unconstitutional and void.

Are the comment and conclusion justified? The section requires an application for a license to be made in writing and provides, with circumstantial detail, what it shall contain, and concludes as follows: "The Commission is hereby authorized to require and *procure* [italics ours] any and all satisfactory proof as shall be deemed

desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker's or salesman's license, or, of any of the officers or members of any such applicant, prior to the issuance of any such license. The Commission is expressly vested with the power and authority to make, prescribe and enforce any and all such rules and regulations connected with the application for any license, as shall be deemed necessary to administer and enforce the provisions of this Act."

The District Court, in further comment upon the provision, expressed a doubt that any rulings or regulations that might be promulgated by the Commission would cure the defect of the statute and added, "however, that question is not here presented, for it does not appear from the pleadings in this case that any such rules have been promulgated though the Commission is functioning in manner and form as authorized by the statute."

So determined was the court in the view it had of § 8, that it rejected the immunity which § 19 gave from the unconstitutionality which might taint any section or provision of the act from extending to other sections or provisions. "Be it further enacted," is the declaration of § 19, "That should the courts declare any section or provision of this Act unconstitutional, such decision shall affect only the section or provision so declared to be unconstitutional, and shall not affect any other section or part of this Act."

The court justified its rejection of § 19 because, in its view, the section had "no application in determining the validity of the sections in which the unconstitutional provision is found." To this conclusion the court considered itself constrained because, to eliminate the offensive part of § 8 "would emasculate the entire section," and the Commission "would be a mere automaton without authority to determine the fundamental questions of the

right of the applicant for a license," because it would be confined to and be compelled to accept as conclusive, the evidence presented by the applicant, which the court considered "was not the legislative intent." And hence the court's conclusion was that § 8 was "so closely related to the valid sections that without it they could serve no purpose within the contemplation of the legislature", citing *Weaver v. Davidson County*, 104 Tenn. 315; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 585.

The views of the court are stated with great force, but we are unable to yield to them—their reasoning or conclusions. By § 8, as we have said, the Commission is "authorized to *require* and *procure* [italics ours] any and all satisfactory proof as shall be deemed desirable in reference" to the conditions and qualifications of applicants for licenses. The words are "require and procure." They seem to have independent and cumulative meaning, one demanding publicity, the other permitting secrecy. But to this possibility we are not disposed; we prefer the admonition of the cases and their decision as expressed in *United States v. Jin Fuey Moy*, 241 U. S. 394, 401, as follows: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408.

In the cited case the admonition is said to express an elementary rule; and we think the statute of Tennessee attracts, instead of repels, the admonition. The statute is drawn with care to details and their importance, importance to the business regulated and the persons who will desire to engage in it; action under it was intended, therefore, to be open and direct, not to be remitted in any part to secrecy, prejudice or intrigue.

In conclusion, we may say, that if the word "procure" is more than a tautological repetition of the word "require", it was only to confer the power of affirmative

direction upon the Commission, necessarily to be exercised in supplement to the action of the applicant and with the same publicity and opportunity of the applicant to meet adverse evidence. And the act, construed as we construe it, will take no power from the Commission necessary to the performance of its duties, and will leave no power with it that it can exercise to the detriment of any right assured to an applicant for a license by the Constitution of the United States.

The decree of the court ordering the issuance of a temporary injunction is

Reversed and the case remanded for further proceedings in accordance with this opinion.